No. 75-1755

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

J. L. SIMMONS COMPANY, INC.,
Petitioner,

v.

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. L. Simmons Company, Inc. ("Simmons") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, denying enforcement of an order of the National Labor Relations Board.

ORDERS AND OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 2a-24a) [1] is not yet officially reported. The supplemental

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[1] "Pet. App." refers to the Appendix attached to the instant petition.

decision and order of the National Labor Relations Board (Pet. App. pp. 25a-33a) is reported at 201 NLRB 70. The original decision and order of the Board (Pet. App. pp. 52a-91a) is reported at 178 NLRB 351. The opinion of the Court of Appeals remanding the original decision to the Board for reconsideration (Pet. App. pp. 35a-51a) is reported at 444 F.2d 895.[2]

JURISDICTION

The judgment of the Court of Appeals (Pet. App. p. 1a) was entered on March 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether coercive jobsite pressure exerted against an employer who has no contractual obligation to the pressuring union to forego use of prefabricated products required by the project owner violates § 8(b)(4)(B) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., §§ 151, *et seq.*) are as follows:

> § 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to

[2] On December 7, 1971, the Court denied Simmons' petition for review of that decision. 404 U.S. 986.

engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * *

STATEMENT

I. The Board's Finding of Facts

On June 2, 1966, the Decatur and Macon County Hospital Association (the "Hospital") requested bids for the construction of an addition to the Decatur and Macon County Hospital in Decatur, Illinois (Pet. App. pp. 53a, 65a). Simmons was the successful bidder and on July 8, 1966, signed a contract with the Hospital for the purchase of material and for the construction on this project (Pet. App. pp. 26a, 53a, 65a). Simmons agreed to abide by the job specifications prepared by Dane D. Morgan and Associates, Architects, and ac-

cepted by the Hospital prior to June 2, 1966 (Pet. App. pp. 62a, 53a, 65a). One specification gave the Hospital the option of requiring Simmons to install either premachined "plastic faced" doors or wood doors (Pet. App. pp. 26a, 53a, 63a).[3]

On August 15, 1966, the Hospital exercised this option, and ordered Simmons to request the prefabricated, factory machined lifetime guaranteed doors from Anderson Wood Products Co.[4] Anderson's life-

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[3] In pertinent part, the architect's specifications (Section 35) provided (Pet. App. 63a-64a):

PLASTIC FACED and WOOD DOORS

1. SCOPE

a. Unless otherwise scheduled, all doors shall be Solid Wood Core Doors with Laminated Plastic Finish as herein specified and shall be identified herein as Plastic Faced Doors.

b. See Method of Bidding. Alternates shall be taken to furnish, install, and finish Solid Wood Core Doors with Flush Wood Veneer Facings, job finished, as herein specified in lieu of Plastic Faced Doors. Flush wood veneered doors are identified herein as Wood Doors.

c. Each door to be factory fit and beveled to net opening sizes and shall be factory machined to satisfy the entire hardware schedule, except for surface applied hardware which does not require shop preparation. No cutting, routing, trimming, or mortising shall be permitted after doors leave factory and doors requiring modifications shall be returned to the factory.

* * * *

2. DOORS

b. Each door to be guaranteed for the life of the building.

[4] Anderson's production employees are represented by a local of the Carpenters' Union, and all Anderson's doors, whether wood or premachined, carry a Carpenters' Union label (Pet. App. pp. 63a-64a).

time guarantee requires that any cutting, routing, mortising, bevelling, or trimming work be done in its plant under its supervision rather than at the jobsite (Pet. App. pp. 26a, 53a, 66a-67a).

Construction began thereafter and Simmons employed members of Carpenters Local 742 (the "Union") on the jobsite. Simmons had no contractual relationship with the Union (Pet. App. pp. 26a, 31a, 53a, 67a). Simmons is signatory to an agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the "International Union") which requires Simmons to observe provisions of local agreements effective in geographical areas where Simmons engages in business. The Union and the Decatur Contractors Association, Inc. are parties to an agreement, but neither this agreement, nor Simmons' agreement with the International Union contains a work preservation clause prohibiting the installation of prefabricated building products on construction projects (Pet. App. pp. 31a, 67a).

In mid-November 1967, approximately 80 of the premachined plastic-faced and edged doors arrived at the Decatur jobsite (Pet. App. pp. 27a, 54a, 68a). Union steward Harold Stolley noticed these premachined doors and advised Union business agent John Foreman, who then arranged a meeting with Simmons' Vice President Robert Neal on December 1, 1967 (Pet. App. pp. 68a, 27a, 54a). At the conference Foreman stated there was a "problem" about these doors and that their use violated the Union's local agreement with the Decatur Contractors Association (Pet. App. pp. 27a, 69a). However, Foreman was unable to point out any particular contractual provision in support of his assertion (Pet. App. p. 69a). Neal explained that

Simmons "was bound by the specifications of the project" which required installation of premachined doors, and that Simmons "had no control" over which doors would be installed (Pet. App. pp. 28a, 69a). Foreman also expressed concern because Anderson's mill carpenters received lower wages than jobsite carpenters (Pet. App. pp. 27a-28a, 70a).[5] The meeting ended after Foreman threatened Neal that the Union "would not handle" the premachined doors (Pet. App. pp. 28a, 70a).

On December 11, 1967, Union steward Stolley refused to permit members of the Union to handle and install the premachined, plastic-faced and edged doors at the jobsite (Pet. App. pp. 28a, 54a, 70a-71a). Union members engaged in this jobsite work stoppage until February 1, 1968, when, in response to a letter from Neal dated January 31, 1968, Foreman informed Simsons by letter that the Union would permit its members to install the premachined doors under protest (Pet. App. pp. 55a, 74a-75a). After Stolley refused to allow jobsite Union members to handle the doors, the Union, through its attorney, also demanded that Simmons agree to a wage premium in addition to the contractual wage rates for each premachined door installed at the jobsite as a condition for ceasing the strike (Pet. App. pp. 28a, 54a-55a, 71a). Thereafter, Simmons filed the unfair labor practice charge upon which this case is based (Pet. App. pp. 28a, 72a).

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[5] In the words of a newspaper reporter, Foreman subsequently characterized the controversy as one involving doors "which had been manufactured in a shop which paid substandard wages, or wages that were lower than a carpenter should receive" (Pet. App. p. 28a n.8).

II. Decisions and Orders Below

A. The Board's Original Decision and Order

The Board, contrary to the Administrative Law Judge, held that the Union had violated § 8(b)(4)(i) and (ii)(B) of the Act. Applying the control standard, the Board reasoned that because the Hospital required, by means of the architect's specification, the jobsite installation of premachined plastic-faced and edged doors, "Simmons Company was a neutral with respect to the assignment of this work" (Pet. App. pp. 55a-56a). Accordingly, the Board concluded that the Union's December threat of a work stoppage, its December 11-February 1 work stoppage, and its demand for premium pay "was for the [unlawful] purpose of forcing (Simmons) to cease doing business with the Hospital and forcing the Hospital to cease doing business with (Anderson) for the furnishing of premachined plastic faced doors . . ." (Pet. App. p. 56a).[6] The Board ordered the Union to cease and desist from unlawfully coercing Simmons "or any other person with respect to premachined doors", and to post appropriate notices (Pet. App. pp. 57a-59a).

B. The Remand Decision of the Court of Appeals

The Court of Appeals concluded that the control standard is "in fundamental conflict" with the surrounding circumstances test set forth in *National Woodwork*[7] because it "elevates control" over other

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[6] The Board declined to rule whether a demand for "premium pay" unaccompanied by a strike or a strike threat "would in and of itself be violative of § 8(b)(4)(i)(ii)(B)" (Pet. App. 56a n.7).

[7] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967) (hereafter "National Woodwork").

factors, "focuses on the wrong set of circumstances", and "fails to evaluate the substance of the Union's objective by looking to see whose labor relations it is addressed to" (Pet. App. pp. 45a-46a). The Court acknowledged that Simmons was not party to any specific work preservation clause (Pet. App. p. 48a), but concluded that such an equity "is not dispositive of this case" (Pet. App. p. 50a). The Court of Appeals remanded the case to the Board for further consideration (Pet. App. pp. 50a-51a).

C. The Board's Supplemental Decision and Order

"Upon the totality of the record", the Board, with one Member dissenting, reaffirmed its prior decision that the Union violated § 8(b)(4)(i) and (ii)(B) of the Act and reissued its remedial order (Pet. App. p. 31a). The Board relied upon the fact that "Simmons was without power to fulfill the desires of the Union unless Simmons forced Anderson and the Hospital to change their lifetime guarantee or caused the Hospital to cease doing business with Simmons and Anderson (Pet. App. pp. 29a-30a). The Union's expressed concern over Anderson's "substandard" wages, and its interest in supporting a general policy "not to install precut doors" rather than supporting specific claims made *sua sponte* by Simmons' jobsite carpenters also evidenced the Union's boycott was to secure objectives elsewhere (Pet. App. p. 30a). The Board further noted that the Union's coercive conduct was not in fact in furtherance of "work preservation" because plastic-faced doors had not traditionally been installed by Union members (Pet. App. p. 30a). Finally, the Board emphasized that "no contract clauses have ever been agreed to . . . guaranteeing that fitting work on

such doors is to be done by unit employees" (Pet. App. p. 31a).[8]

D. The Decision of the Court of Appeals

The Court of Appeals set aside the Board's order and remanded the case for dismissal of the unfair labor practice complaint. Since "the control factor again appears to have played a decisive role," the Court considered the Board's ruling to be contrary to *National Woodwork, supra,* and reversible as a matter of law in the aftermath of the Court's *en banc Enterprise*[9] opinion (Pet. App. p. 23a). The Court also reviewed the record evidence of secondary object and found it "unsubstantial" (Pet. App. p. 23a). The Court emphasized that, in its view, Simmons could have resolved the labor dispute by agreeing to the Union's demand for premium pay as a condition of jobsite installation of the premachined doors without any direct impact on employers other than Simmons (Pet. App. pp. 22a-23a).

REASONS FOR GRANTING THE WRIT

I. Introduction

This case presents an important and significant extension of the "work preservation" doctrine, and raises issues beyond those presently before the Court in *Enterprise.*[10] The decision below is contrary to rulings

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[8] The Board stated that this analysis was required by the law of the case and should not be construed as abandonment of the control standard (Pet. App. p. 31a).

[9] *Enterprise Ass'n of Steamfitters, Local 638* v. *NLRB*, 521 F.2d 885 (1975), *cert. granted,* — U.S. —, 96 S.Ct. 1101 (1976).

[10] *Id.*

of the Court, conflicts with decisions of other circuit courts of appeals, and, without any legislative support, places virtually every boycott of prefabricated building products beyond the reach of § 8(b)(4) of the Act, regardless of the presence or absence of a "work preservation" provision reserving jobsite tasks for bargaining unit employees.

II. The Decision Below Is Contrary to the "Work Preservation" Rulings of the Court

The landmark decisions of the Court authorize coercive boycott activity only where a collective bargaining agreement specifically reserves jobsite work for bargaining unit employees and where the signatory employer retains the prerogatives to assign the disputed work. In *National Woodwork*, the Court construed the boycott proscriptions of § 8(b)(4)(B) to be inapplicable to coercive jobsite pressures directed solely at one employer to persuade him to abide by his contractual promise to assign work to bargaining unit members, where that same employer could simply reassign the work to meet the union's demand and thereby end the labor dispute.[11] The *ratio decidendi* for this analysis was the specific work preservation agreement existing between Frouge, the struck employer, and his employees. The Court specifically held that "agreements directed to work preservation" were not prohibited by § 8(e) of the Act (386 U.S. at 640), and

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[11] This contractual provision provided in pertinent part:

> No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted.

noted that such agreements were common "within the collective bargaining framework." 386 U.S. at 643. The Court's test of a permissible boycott postulated the existence of an employer's contractual promise to make work assignments only to bargaining unit employees (386 U.S. at 645): "The touchstone is whether the *agreement* or its maintenance is addressed to the labor relations of the *contracting* employer *vis-a-vis* his own employees." (emphasis supplied)

Houston Insulation Contractors Ass'n v. *NLRB*, 386 U.S. 664 (1967), the Court's other "work preservation" decision, is likewise founded upon a specific agreement in the context of collective bargaining to reserve certain tasks for bargaining unit employees. There Armstrong agreed with Asbestos Workers Local 22 to a contractual provision precluding subcontracting of work at any jobsite relating to "the preparation, distribution, and application of pipe and boiler (insulation) coverings." [12] Here, it is undisputed that neither the local agreement between the Union and the Decatur Contractors Association, nor Simmons' contract with the International Union contains any limitations upon the type of materials which may be utilized in meeting Simmons' contractual obligation to the Hospital.

Necessarily outside the reach of these narrow precedents are employers who have not made such a contractual promise.

tractual promise. In such circumstances an employer's decision to order materials in the performance of busi-

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[12] The specifications on the construction project where the Union struck Armstrong did not require use of the prefabricated insulation material. See 148 NLRB 866 (1964).

ness obligations, like the decision to cease doing business,[13] is normally within its discretion to manage its business, subject only to limitations freely entered into, in the give and take of collective bargaining.[14] Where no such contractual limitations exist, an employer is "disinterested" in the union's boycott and thus protected by § 8(b)(4) from coercive union pressure to support boycott objectives against third parties. The decision below is contrary to the narrow exception to this protection assayed by the Court in *National Woodwork* and *Houston Insulation.*[15]

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[13] *Textile Wkrs.* v. *Darlington Mfg. Co.*, 380 U.S. 263, 274 (1965).

[14] *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964) is not to the contrary. That opinion was carefully limited to the facts before the Court, *i.e.*, the elimination of *all* bargaining work. "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy (footnote omitted)." 379 U.S. at 215. Unlike the facts in *Fibreboard* the job specifications here eliminated only a small portion of the Union's jobsite tasks. This partial "subcontracting" is not a mandatory subject of bargaining, and the Board's General Counsel so recognized by dismissing the Union's refusal to bargain charge filed against Simmons (Pet. App. pp. 72a-73a).

[15] The Court of Appeals acknowledged (Pet. App. p. 48a) that Simmons was under no contractual obligation to honor the Union's "work preservation" demands, but, in the face of contractual silence on this point, relied upon the "law of the industry and a particular shop" to conclude that the Union "had a contractual claim on Simmons" (Pet. App. p. 49a). In the absence of any bargaining history, silence on the matter in controversy is not to be construed as a contractual waiver of management's rights. *E.g.*, *Radiocar Corp.*, 199 NLRB 1161 (1972). See also *NLRB* v. *J. H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir.), *cert. denied*, 335 U.S. 814, *reh'g denied*, 335 U.S. 905 (1948). Cf. *Teamsters' Union* v. *Lucas Flour Co.*, 369 U.S. 95, 106 (1962) (union's *implied* strike promise no broader than employer's express arbitration promise). The Board found that neither the Union nor the International Union attempted in negotiations to limit

(cont.)

III. The Decision Below Is Contrary to the Rulings of Other Circuits

A. The Union's Jobsite Work Stoppage

The Ninth Circuit has ruled that § 8(b)(4)(B) proscribes threats of jobsite strikes directed to non-signatory contractors to compel observance of "work preservation" objectives. *Western Monolithics Concrete Prods. Inc.* v. *NLRB*, 446 F.2d 522 (9th Cir. 1971). Even though the general contractor in that case could conceivably have satisfied the union's demands by ordering other than prefabricated fireplaces, the absence of a collective bargaining agreement with the pressuring union placed the general contractor beyond any obligation to assign work to union members or to pressure other contractors to reassign the disputed work to union members. The Fourth Circuit has also held that "work preservation" work stoppages are secondary if directed to any employers "not in (contractual) privity" with the striking union. *George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323, 327 (1973). *Accord: Carpenters, Local 112 (Summit Valley Inds. Inc.)*, 217 NLRB No. 129 (1975), 89 LRRM 1799 (review petitions pending 9th Cir.) (Nos. 75-2064, 2166, 2770).

The Court of Appeals made no effort to reconcile or distinguish these contrary authorities which squarely

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jobsite installation of premachined millwork (Pet. App. p. 31a). And as the Board found, the practice, if any, in the Union's jurisdiction had been to install premachined doors without protest (Pet. App. p. 27a n.7).

The Court of Appeals (Pet. App. (49a) also faults Simmons for not reaching some "compromise" with the Union at the time it entered into the contract with the Hospital. At that time, however, the Hospital had not yet exercised its unilateral option to require premachined doors (Pet. App. pp. 65a-66a).

hold that § 8(b)(4)(B) bars coercive conduct directed against contractors, like Simmons, who are not subject to work preservation agreements with the pressuring union. Review is thus appropriate to resolve an issue, not presented in *Enterprise,* now the subject of squarely contrary circuit court holdings.

To be sure labor organizations may be emotionally inclined to enlist as many contractors as possible to keep certain prefabricated products out of the union's jurisdiction. Unconsenting employers, however, are protected by § 8(b)(4) from coercive threats and strikes to force them to accede to such union objectives which preforce require termination of existing business relationships. This statutory provision reflects a specific Congressional policy to preclude unions from using unoffending and disinterested employers to enforce boycotts against products manufactured by third parties. *NLRB* v. *Local 769, Elec. Wkrs.,* 405 F.2d 159, 163 (9th Cir. 1968), *cert. denied,* 395 U.S. 921 (1969). And the circuit courts have consistently recognized that union-caused work stoppages to protect *future* work opportunities for union members or to advance the *general* welfare of union members are beyond the legitimate interests of bargaining unit employees and thus violate § 8(b)(4). *Local 216,* Teamsters v. *NLRB (Bigge Drayage Co.),* 520 F.2d 172, 179-80 (D.C. Cir. 1975); *NLRB* v. *New York Lithographers,* 385 F.2d 551, 555 n.10 (3d Cir. 1967); *Local 710, Meat and Highway Drivers* v. *NLRB,* 335 F.2d 709, 717 (D.C. Cir. 1964).

B. The Union's Demand for Wage Compensation

The Court of Appeals also held that the Union's demands for financial compensation from Simmons for

work performed by Anderson's plant employees would not constitute coercive conduct within the scope of § 8 (b)(4) of the Act (Pet. App. pp. 21a-22a). Congress, however, intended to foreclose all "threats [of] labor trouble or *other consequences*" and to prohibit the carrying out of such threats by a "strike or other economic retaliation." II Legislative History of LMRDA (GPO, 1959) at 1568(2), 1523(1), 1581(1).

The Ninth Circuit has reflected this legislative intent in decisions holding that assessments unilaterally imposed by labor organizations either by fines or wage compensations are prohibited by this provision of the Act. In *Acco Constr. Equip. Inc.* v *NLRB*,[16] the Operating Engineers fined certain contractors who assigned jobsite repair work on heavy equipment to non-members of that union The court ruled that "this unilateral fining mechanism constitutes a form of coercive economic pressure" within the scope of § 8(b)(4)(ii)(B). 511 F.2d at 852. And in *Associated General Contractors of Cal.* v. *NLRB*,[17] an assessment of $557.-76, the equivalent of wages and fringe benefits not earned by union members, charged a contractor who installed hospital scrub stations containing prefabricated piping was held violative of § 8(b)(4)(B). Such an assessment enlisted an unoffending employer in the union's boycott of prefabricated plumbing fixtures since "this [assessment] practice will influence the business decisions of hospital builders and scrub sink manufacturers." 514 F.2d at 434. See also *NLRB* v. *Local 769, Elec. Wkrs., supra* (threat to terminate existing contract to enforce union boycott "coercive" within the scope of § 8(b)(4)(B)). The decision below inverts

[16] 511 F.2d 848 (9th Cir. 1975).

[17] 514 F.2d 433 (9th Cir. 1975).

this reasoning by concluding that demands for compensation as a condition for cessation of "jobsite work stoppage" is outside the reach of § 8(b)(4), simply because Simmons refused to accede to this "compromise". But Simmons itself had no funds to make additional payments to the Union. And Simmons had no basis in its price contract with the Hospital to make a claim for compensation for additional labor costs. Thus, this "option," given great weight by the Court below (Pet. App. p. 22a), was actually illusory.

As the Court of Appeals noted (Pet. App. pp. 21a-22a n.19), the question of whether compensation demands for work not actually performed by jobsite employees violates § 8(b)(4)(ii)(B) is not presented in *Enterprise*. The Ninth Circuit has held in the cases discussed above and the realities of this case reflect that product boycotts can be as effectively maintained by compensation demands as by strikes and threats of work stoppages. See also Leslie, "Right to Control: A stuy in Secondary Boycotts and Labor Antitrust," 89 Harv. L. Rev. 904, 912 (1976). It is essential then that the Court accept this timely opportunity to resolve both questions presented here so that the scope of § 8(b)(4)(B) boycott protection can be delineated in one decision.

IV. The Decision Below Undermines National Labor Policy

The Court of Appeals' ruling authorizes labor organizations to use unwilling employers as pawns to enforce product boycotts. This ruling not only effectively nullifies the protection Congress extended to such unconsenting employers in § 8(b)(4)(B), but also restrikes the balance between labor and management created by

Congress in the 1947 Taft-Hartley Act. This statute was enacted to limit labor's free exercise of economic weapons and to protect employers from the harsh consequences of union boycotts. Senator Taft characterized this statutory philosophy on the Senate floor before passage of the Taft-Hartley Act (93 Cong. Rec. 7690-91 (1947)):

> We have tried to correct secondary boycotts and jurisdictional strikes. The truth is that originally, before the passage of any of the laws dealing with labor, the employer had all the advantage. He had the employees at his mercy, and he could practically in most cases dictate the terms which he wished to impose. Congress passed the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act. The latter act was interpreted by a completely prejudiced board in such a way that it went far beyond the original intention of Congress, until we reached a point where the balance had shifted over to the other side, where the labor leaders had every advantage in collective bargaining and were relieved from any liability in breaking the contract after they had made the bargain. That was a condition under which strikes actually were encouraged and protected, no matter what the purpose or the character of the particular strike.

The Court has been faithful to this legislative intent to prevent unions from forcing employers to boycott "someone else".[18] As one noted commentator has stated: "There was little justification for many

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[18] *E.g., NLRB* v. *Local 79, Plasterers*, 404 U.S. 116, 130, n.25 (1971); *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297, 302-03 (1971); *NLRB* v. *Radio and Television Broadcasting Engineers*, 364 U.S. 573, 580-81 (1961); *Local 501, Elec. Wrks.* v. *NLRB*, 341 U.S. 694, 705 (1951); *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686 (1951).

secondary boycotts and jurisdictional strikes." Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 Harv. L. Rev. 274, 314 (1948).

To permit unions to strike employers who are under no contractual obligation to the union, grants labor organizations broad economic leverage beyond current representational and contractual interests. Such pressure directly disrupts seemingly unrelated transactions which evolve out of increasingly close economic interrelationships. These residual impacts tip the balance of economic power in favor of unions by closing markets to employers thereby limiting their growth possibilities, in contravention of express national labor policy set forth in § 8(b)(4).

Commentators have also noted the adverse impact "work preservation" claims have upon the nation's most significant industries, and upon technological innovations in production methods. See generally Brinker and Taylor, "The Secondary Boycott Maze," 25 Lab. L. J. 418, 427 (1974); Petro, "Unions, Housing Costs, and the National Labor Policy," 32 Law & Contemp. Prob. 319, 322 *et seq* (1968). Economists have also concluded that the work preservation concept is not based upon valid economic theory and does not actually have the effect of preserving jobs for union members.[19] The knowledge now available may

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[19] Meyers and DePodwin, "The Economic Personality of the Construction Industry and the Need for Technological Change" (New York 1973); and Meyers and DePodwin, "A Theoretical Analysis of the Work Preservation Concept" (New York 1973).

The necessity for a coordinated interrelationship between national labor and economic policies has also been persuasively set forth in Wellington, *Labor and the Legal Process*, 298-333 (New Haven 1968). *Cf. Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) (Labor Board must take account of other important congressional polices in administering federal labor policy).

provide a basis for reconsideration of the "work preservation" doctrine in light of both national labor and antitrust policy. Cf. *Connell Constr. Co.* v. *Local 100, Plumbers,* 421 U.S. 616 (1975). As the Court stated in *Allen Bradley Co.* v. *Local 3, Elec. Wkrs.,* 325 U.S. 797, 811 (1945):

> We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1975

No. 73-1120

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS, AND JOINERS OF AMERICA, JOHN FOREMAN, Business Agent, and HAROLD STOLLEY, Steward, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
J. L. SIMMONS, COMPANY, *Intervenor*

PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before: McGOWAN, ROBINSON and ROBB, *Circuit Judges.*

Judgment

This cause came on to be heard on a petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review herein is set aside and the case is remanded to the Board for dismissal of the charges.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 4, 1976

Opinion for the Court filed by Circuit Judge McGowan.
(Filed March 4, 1976)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1120

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS, and JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, and HAROLD STOLLEY, STEWARD, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

J. L. SIMMONS, COMPANY, INTERVENOR

Petition for Review of Order of National Labor Relations Board

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Argued January 21, 1974

Decided March 4, 1976

Bernard M. Mamet for petitioner.

Jay E. Shanklin, Attorney, National Labor Relations Board, of the bar of the United States District Court for

the District of Columbia, *pro hac vice*, by special leave of court, with whom *John S. Irving*, Deputy General Counsel, *Patrick Hardin*, Associate General Counsel, and *Elliott Moore*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent. *Marcel Mallet-Prevost*, Assistant General Counsel National Labor Relations Board at the time the record was filed, also entered an appearance for respondent.

S. Richard Pincus of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Milton A. Smith*, *Richard Berman* and *Gerard C. Smetana* were on the brief, for The Chamber of Commerce of the United States of America as *amicus curiae*.

Paul G. Gebhard entered an appearance for intervenor J. L. Simons Company.

Before: McGowan, Robinson and Robb, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* McGowan.

McGowan, *Circuit Judge*: As critical, as it is subtle and difficult, is the distinction in labor law between "primary" and "secondary" activity. It is one that must be drawn by the National Labor Relations Board and reviewing courts in determining whether a labor union has violated the statutory ban on secondary boycotts. National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B); *see National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 645 (1967). The Board has, for a number of years, applied a *per se* "right to control" test in adjudicating Section 8(b)(4)(B) charges. Under that test, the Board, even after it concludes that a union's refusal to work was for the purpose of preserving work that has historically and traditionally been performed by the unit, will nevertheless find the activity to be secondary if the employer did not have the legal right to control assignment of the disputed work.

See, e.g., Deangulo & Local Union No. 98 (York Corp.), 121 NLRB 676, 685-86 (1958); *Pipe Fitters, Local 120*, 168 NLRB 991, 992 (1967).

In its initial decision in this case, the Board applied its right to control test and found the union in violation of Section 8(b)(4)(B). 178 NLRB 351 (1969). On review here, a division of this court found the Board's use of the *per se* right to control test invalid and remanded the case to the Board for an adjudication of the 8(b)(4)(B) charge "under all the surrounding circumstances," including the facts concerning right to control assignment of the disputed work. *Local 742, Carpenters v. NLRB*, 444 F.2d 895, 903 (D.C. Cir.), *cert. denied sub. nom. J. L. Simmons Co. v. Local 742, Carpenters*, 404 U.S. 986 (1971). The Board, claiming that it had looked at all the relevant circumstances, again found a Section 8(b)(4)(B) violation. 201 NLRB 70 (1973). The union then sought further review in this court, arguing that the Board had actually reapplied the right to control test and that the Board's decision was not supported by substantial evidence in the record.

While the case was pending, the court agreed to hear en banc another case, *Enterprise Association, Local 638 v. NLRB*, which involved the issue of the validity of the Board's use of the right to control test; and disposition of the present review petition was delayed to await the outcome of the en banc proceeding. *Enterprise*, decided July 1, 1975, reaffirmed the prevailing rule in this [1] and other circuits [2] that "the right to control test miscon-

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[1] Local 742, Carpenters v. NLRB, *supra;* Local 636, Plumbers & Pipefitters v. NLRB, 430 F.2d 906 (D.C. Cir. 1970).

[2] Western Monolithics Concrete Prods., Inc. v. NLRB, 446 F.2d 522, 526 (9th Cir. 1971); Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 192 n.10 (1st Cir. 1969) (*dictum*); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561 (8th Cir. 1968); NLRB v. Local 164, IBEW, 388

strues Section 8(b)(4)(B) as interpreted by the Supreme Court in *National Woodwork Manufacturers Assn. v. NLRB.*" 521 F.2d 885, 888, *cert. granted*, 44 U.S. L.W. 3462 (U.S. Feb. 23, 1976) (No. 75-777).

The case *sub judice* thus presents this court with its first post-*Enterprise* opportunity to review the Board's analysis of "all the surrounding circumstances" in a case that would otherwise have been determined on the basis of the right to control test. We conclude that the Board's findings are not supported by substantial evidence in the record, and that its order under review must be set aside.

I

In July, 1966, the J. L. Simmons Co., Inc. (Simmons) signed a contract with the Decatur and Macon County Hospital Association (Hospital Association) for the purchase of materials for and the construction of additions to the Hospital Association's Decatur, Illinois facilities. Simmons, as the general contractor, hired a number of Local 742 carpenters to perform appropriate carpenter duties on the project.[3] At the time the contract was

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F.2d 105, 107-10 (3d Cir. 1968); *see* NLRB v. Local 21, Sheet Metal Workers, 380 F.2d 827, 830 (2d Cir. 1967). *But see* Associated General Contractors v. NLRB, 514 F.2d 433, 437-38 (9th Cir. 1975) (dictum). *Contra,* George Koch Sons, Inc. v. NLRB, 490 F.2d 323 (4th Cir. 1973).

[3] At the time of the project, Simmons had no direct contractual relationship with Local 742. Simmons did have a contract, however, with the International United Brotherhood of Carpenters and Joiners of America, Local 742's parent international union. 178 NLRB 351, 355 (Trial Examiner's decision). The contract between Simmons and the United Brotherhood required Simmons to observe the working conditions and wages prevailing in the local community. The contract also contained the following two clauses: "Any Employer who sublets any of his work must sublet such work in accordance with the current procedural rules of the Nat'l

signed, it called for installation of several hundred wood doors,[4] a task that might have been expected to provide considerable work for the carpenters since wood door installation traditionally involves prior preparation (trimming, cutting, routing, mortising) as well as actually hanging the doors.[5]

The Hospital Association, however, expressly reserved in the contract the option to switch to more expensive premachined plastic-clad doors if adequate financing be-

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Joint Board in effect at the time a dispute may occur. Any Employer who sublets any of his work must sublet such work subject to the provisions concerning wages, hours and working conditions as hereinafter set forth in this contract." *Id.*; Appendix at 145-46.

[4] The original specifications issued to interested bidders by the Hospital Association's architect included a provision for installation of premachined plastic-clad doors and a "deduct alternate" that gave the Hospital Association the option to replace the plastic-clad doors with wood doors. In order to qualify for certain federal grant monies by lowering the price of the project, the Hospital Association's architect negotiated with Simmons, the lowest bidder, to provide for acceptance of the wood door option. Thus, although the original specifications called for installation of premachined plastic-clad doors, the initial contract called for installation of wood doors. *See* App. at 31-35, 123-24.

[5] There is some disagreement over whether the job specifications (*see* App. at 159-62) called for premachined wood doors as opposed to blank wood doors to be prepared at the job site. Both Simmons and the Trial Examiner take the position that the wood doors were not to be premachined. *See* 178 NLRB at 354 & n.3. The Board, on the other hand, would conclude that wood doors were to be premachined. *Id.* at 351 n.4. We do not find it necessary to resolve the dispute, for in either event the union could *legitimately expect* that it would perform work that no one disputes has historically and traditionally been unit work, namely, preparation of wood doors. *See id.* at 358 (Trial Examiner's decision); 201 NLRB at 72 (Member Fanning, dissenting).

came available. On August 15, 1966, the Hospital Association and Simmons agreed to substitute premachined plastic-clad doors for the originally specified wood doors. And in mid-November of 1967, approximately eighty of the premachined plastic-clad doors arrived on the construction site.

Simmons apparently recognized that installation of factory prepared doors would cause some controversy with the union, for Simmons wrote to its attorneys on November 18, 1967 concerning these premachined doors and "the Philadelphia precut door case," obviously referring to *National Woodwork Manufacturers Association, supra.* Meanwhile, one of the members of Local 742 brought the premachined doors to the attention of John Foreman, business representative of Local 742. Foreman consulted the union's attorney, who advised Foreman that the union had "the right to refuse to install these doors [to] protect the dimunition [sic] of the bargaining unit," and that the union should offer to install the eighty doors if Simmons would agree to cancel the balance of the order.

Pursuant to this advice, Foreman met with Neal, Vice-President of Simmons, on December 1, 1967 to discuss installation of the factory prepared doors. Foreman argued at the meeting that the union carpenters had been deprived of bargaining unit work and that the door preparation was being done by factory carpenters employed at a lower wage than Local 742 carpenters. Neal argued that Simmons had "no control" over choice of the doors since the contract had specified premachined plastic-clad doors. Neal also informed Foreman that the contract required a lifetime guarantee on all plastic-clad doors, and that the supplier of the doors refused to give more than a one-year guarantee on any plastic-clad door that had been prepared or adjusted at the

jobsite.[6] Foreman and Neal failed to resolve the controversy, and they decided to leave settlement of the issue up to their attorneys.

On December 11, 1967, Simmons's job superintendent asked some Local 742 carpenters to install premachined doors in the intensive care unit of the building. The carpenters refused, and later that day the attorney for Simmons called the attorney for the union concerning the concerted refusal to hang the doors. The union's attorney, after expressing surprise upon learning from Simmons's attorney that the contract specified premachined doors,[7] stated that the union did not intend a product boycott. The attorney for Simmons then apparently rejected an offer by the union's attorney calling for installation of all the premachined doors upon payment of premium pay to the carpenters by Simmons. On December 15, 1967, Simmons filed the unfair labor

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[6] The door supplier generally gives a one-year guarantee on blank wood doors—that is, wood doors prepared at the jobsite. See App. at 41. The record is not entirely clear as to whether this supplier will give a life-time guarantee on premachined wood doors. *See* App. at 39, 41.

[7] No doubt the attorney for the union realized that the union could no longer rely squarely on *National Woodwork Manufacturers Association v. NLRB*, *supra*, since the Supreme Court expressly noted that it did not have before it the issue "whether the Board's 'right to control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand'—is an incorrect rule of law inconsistent with . . . *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477, 497-98." 386 U.S. at 616-17 n.3. And although Simmons interpreted this footnote as indicating possible approval of the Board's *per se* test, this court has taken the position that the Supreme Court's " 'reservation' of the control question is better understood as a warning that the opinion not be read as impliedly *approving* the Board's right to control doctrine." Enterprise Ass'n, Local 638 v. NLRB, *supra*, 521 F.2d at 893 n.14 (emphasis in original).

practice charges that are the subject of the instant case. With the legal issues before the Board for resolution, Foreman eventually authorized the Local 742 carpenters to begin installing the premachined doors.[8]

II

Section 8(b)(4)(B) bars "as a secondary boycott union activity directed against a neutral employer, including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere." *National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. at 632. If a dispute is "addressed to the labor relations of the contracting employer *vis-a-vis* his own employees," the union's activity is protected primary activity despite the fact that it will inevitably have an adverse impact on secondary employers. *Id.* at 627, 645; *see Enterprise Association, Local 638 v. NLRB*, *supra*, 521 F.2d at 900-01. Included within the category of protected primary activity are union efforts to preserve traditional unit work. *National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. at 646. But if an object of the union activity is "one proscribed by the statute, the action will be condemned even though it might also have legitimate labor objectives." *NLRB v. Local 164, IBEW*, 388 F.2d 105, 108 (3d Cir. 1968); *see NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951) ("It is not necessary to find that the sole object of the strike [be unlawful]").

The Board concluded that there was "scant evidence that a primary dispute existed over 'genuine work pres-

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[8] During December of 1967, Local 742 carpenters had installed several premachined doors in the hospital's cardiac intensive care unit because of the urgent need to have that part of the facility completed as soon as possible. App. at 70, 86.

ervation'," but that there was substantial evidence to establish a secondary purpose in the union's refusal to install premachined doors. 201 NLRB at 71 (1973). Our task then, is to determine whether the Board's findings are supported by substantial evidence in the record. National Labor Relations Act, § 10(e), (f), 29 U.S.C. § 160(e), (f) (1970).

A. The Evidence Concerning a Work Preservation Objective.

We begin with the Board's findings with respect to the absence of a primary work preservation objective. The Board noted that there is "no direct evidence that plastic-clad doors have ever, much less traditionally, been installed" by members of Local 742. 201 NLRB at 71. According to the Board, the only record evidence favorable to the union in this regard is an "unsupported assertion" by business agent Foreman that members of Local 742 had prepared and installed plastic-clad doors (manufactured by the same supplier involved in the instant dispute) for Simmons. 201 NLRB at 71-72. The assertion was certainly not unsupported; Neal, the Vice-President of Simmons, testified that this fact was "just exactly right." App. at 66. Moreover, Neal also testified that plastic-clad doors had been prepared for installation at a Simmons construction site in Carbondale, Illinois by a different local of the Brotherhood of Carpenters.[9]

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[9] Neal tried to distinguish the Carbondale project by telling Foreman that the specifications on that job required only a one-year guarantee on doors. App. at 68. Since the doors installed on that project were plastic-faced (plastic on both sides of the door) but not plastic-edged, a one-year guarantee is all that the supplier would give; the supplier reserves its life-time guarantee for completely plastic-clad premachined doors. App. at 41. *But see* note 6 *supra*. Although specifications concerning the scope of the guarantee are relevant to the right to control factor, we stress that

But even if we assume that the Board was correct in concluding that there was no evidence that carpenters had ever prepared plastic-clad doors for installation, we would not necessarily conclude that preparation of such doors involved other than traditional unit work. The question is not whether carpenters have ever worked on plastic-clad doors before, but whether the work involved in preparing plastic-clad doors for installation is the *type* of unit work which carpenters have traditionally performed.[10] "Activity . . . which directly protect[s] *fairly claimable* jobs [is] primary under the Act." *Meat and Highway Drivers, Local 710 v. NLRB*, 335 F.2d 709, 713 (D.C. Cir. 1964) (emphasis added); *see Local 636, Plumbers & Pipefitters v. NLRB*, 430 F.2d 906, 911 (D.C. Cir. 1970); *cf. Brotherhood of Locomotive Firemen & Engineermen v. National Mediation Board*, 410

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they have no bearing on the question of the scope of unit work. There is simply nothing in the record that indicates that preparation of *completely plastic-clad* doors requires skills different from or in addition to those involved in the preparation of plastic-faced doors. *But see* note 13 *infra*. The Carbondale project is thus one piece of evidence indicating that the work involved in preparing plastic-clad doors for installation is the *type* of work traditionally performed by carpenters.

[10] We addressed a somewhat similar question in our en banc option in *Enterprise*. The argument was made in that case that unions, when they insist that a subcontracting employer either not bid on a contract or, if he does bid, compensate them for work lost due to prefabrication, are pursuing work *acquisition* rather than work *preservation*. The court explicitly rejected that argument: "[B]y the very nature of subcontract bidding, a subcontractor will always be acquiring work when he bids on a project; the characterization of union activity as having a work preservation objective must therefore depend on whether it is the *type* of unit work which the employees have traditionally performed, not whether they actually performed the particular work in question." 521 F.2d at 895-97 n.25 (emphasis in original).

F.2d 1025, 1029-32 (D.C. Cir.), *cert. denied*, 396 U.S. 878 (1969). Otherwise, employee rights would be lost whenever new advances in technology or industry practice altered the nature of a product but not the type of work required to install it. *Cf. Local 742, Carpenters v. NLRB*, *supra*, 444 F.2d at 902 n.15.

The evidence in this record indicates that the tasks and skills involved in the preparation of plastic-clad doors are closely related to those involved in traditional carpenter preparation of wood doors.[11] In fact, according to the manufacturer of the plastic-clad doors involved in this case, a "qualified craftsman with the appropriate tools" would have no difficulty in preparing plastic-clad doors at the jobsite for final installation.[12] This evidence, combined with the fact that carpenters had apparently installed non-premachined plastic-clad doors on other projects, led the Trial Examiner to find that the work of preparing plastic-clad doors for installation

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[11] Plastic-clad doors are essentially wood doors covered with plastic. Preparation of such doors for installation certainly seems to be more like the *type* of work involved in preparing *wood* doors when the *type* involved in preparing *metal* doors, a task which the carpenters have not claimed as traditional unit work. App. at 60.

[12] Indeed, there is some evidence in the record which indicates that Local 742 carpenters had reprepared several of the premachined plastic-clad doors in order to install them properly. App. at 109-14. Simmons did not authorize this work by the carpenters, and subsequently ordered the carpenters to set aside rather than reprepare any door that did not fit properly. App. at 111. The reason for this order is not made explicit, but a reading of the entire record suggests that Simmons was concerned that the manufacturer would refuse to issue a life-time guarantee on the doors, and not that the carpenters were unable to do the work efficiently.

is the "historical and traditional unit work of carpenters at the jobsite." [13] 178 NLRB at 358.

In rejecting this finding by the Trial Examiner, the Board stressed that there was undisputed record evidence indicating that members of Local 742 had on one prior occasion installed without objection approximately twelve to twenty plastic-clad doors for a construction company other than Simmons. The Board failed to note, however, that the preparation was apparently completed without the union's knowledge. Moreover, we are unwilling to hold that one incident almost four years earlier involving installation of only twenty premachined plastic-clad doors constitutes a waiver of Local 742's work preservation claim.

The Board also emphasized that there is no contract clause guaranteeing to the carpenters the preparation work on doors of any material, and no evidence that such a work preservation clause had ever been discussed in contract negotiations between the parties. We agree with dissenting member Fanning that we can attach "no great significance" to the absence of a specific contract

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[13] Although the Trial Examiner concluded that "bevelling, routing, mortising, and cutting for length" involved traditional unit work, Local 742 has decided not to claim the task of bevelling plastic-clad doors. The union apparently recognizes that plastic-clad doors must be bevelled *before* plastic strips are attached by heat and pressure to the edges of the door, and that the carpenters do not have the necessary equipment at the jobsite to attach the plastic edges. Consequently, they are willing to install doors that have been bevelled at the factory. *See* Supp. App. at 9-10.

Plastic strips are not attached to the tops and bottoms of the plastic-clad doors, and once the doors have been cut for length the tops and bottoms are sealed by brushing on a sealant, a task that can be performed at the jobsite. *See* Supp. App. for the Board at 10. But the carpenters apparently do not claim the task of cutting the doors for length. Supp. App. at 21.

clause covering preparation of plastic-clad doors "in light of the facts (1) that there is no disagreement that the work in dispute, if to be done on *wood* doors, traditionally has been done by the Union's members on the jobsite and (2) that there is no contract clause governing the handling of this work on wood doors either . . . ." 201 NLRB at 72. Although the absence of a specific work preservation clause is certainly one of the factors to be considered in looking at "all the surrounding circumstances," when examined in light of the other relevant circumstances in this case it lends little support to the Board's finding that there was no primary work preservation objective.[14]

A review of the entire record—rather than just the facts isolated by the Board—makes it even more difficult to sustain the Board's conclusion that there was little evidence to indicate a work preservation objective. On numerous occasions union officials discussed the premachined door issue with representatives of Simmons in purely work preservation terms.[15] And, more important,

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[14] *See* Local 742, Carpenters v. NLRB, *supra*, 444 F.2d at 903:

> If the presence or absence of a work preservation agreement is to make a difference, it can only be as one of many "surrounding circumstances" used to determine what the *union's objective* was. It may be, for example, that when a union acts to enforce a specific clause, its objective more clearly relates to its labor relations with the primary employer. But the absence of such a specific clause is obviously not enough by itself to indicate a secondary objective relating to another employer.

(Emphasis in original.)

[15] *E.g.*, App. at 69 (Simmons Vice-President Neal testified that Foreman told him that the carpenters "had been denied the work of prefitting and premachining these doors for hardware"); App. at 149-50 (Foreman indicated that he told Neal at the December 1 meeting that "the work that had been done on the doors at the mill . . . was work that had been done in the past exclusively by members of [the] bargaining

the union offered Simmons a compromise under which the members of Local 742 would install the premachined doors in exchange for premium rates of pay.[16] Since maintenance of the income level of its members is presumably the objective behind union work preservation efforts, evidence of the proposed compromise is indicative of a primary work preservation intent. *See Enterprise Association, Local 638 v. NLRB*, *supra*, 521 F.2d at 899 ("Evidence that the union was *unwilling* to permit the members to install the [premachined] units even if they were paid for the work they lost by the [premachining] would call into question [a] finding that the union's objective was merely work preservation . . . .") (emphasis added).

B. Evidence Concerning Secondary Objectives.

Of course, all that is necessary to find a violation of Section 8(b)(4)(B) is that "*an* objective of the union's secondary action, although *not necessarily the only objective*, is to force the secondary employer to cease doing business with the primary party." *Local 419, Carpet Layers v. NLRB*, 467 F.2d 392, 399 n.13 (D.C. Cir. 1972) (emphasis in original); *see* cases cited page 8 *supra*. Consequently, we must determine whether there is substantial evidence in the record to support the Board's finding of "union objectives elsewhere." 201 NLRB at 71.

In the portion of its supplemental opinion dealing with Local 742's alleged secondary objectives, the Board first

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unit" and that "it was [Neal's] responsibility to tell the mill . . . to stop doing [the union's] work"); App. at 101 (the attorney for the union stated that he advised Foreman to tell Neal that the carpenters would not hang the doors "because it was bargaining unit work").

[16] App. at 54; 178 NLRB at 356-57 (Trial Examiner's decision); *see* App. at 166-68.

considered Simmons's lack of "control" over the assignment of the disputed work, noting that it still "deem[s] highly relevant to a determination of objective the question as to whether the struck or picketed employer has any power to grant the union's demands." 201 NLRB at 71. The Board then stated: "[I]f the facts demonstrate that there is no possibility that the struck or picketed or threatened employer can resolve the dispute except by either forcing a secondary independently owned and oprated business to take some action or by [sic] ceasing to do business with some other entity, then even though the union's conduct can be said to fall, in part, at least, under the rubric of 'work preservation,' we are inclined to find such a set of facts indicative of 'union objectives *elsewhere*.'" *Id.* By taking this position, the Board has merely changed the status of the lack of "control" factor from a *per se* test to a *prima facie* inference that there is an illegal secondary objective.

Although the issue of the validity of the Board's *prima facie* inference approach has not previously been squarely presented to this court, we did have an opportunity to comment on that approach in the course of our en banc opinion in *Enterprise* and disapproved it in no uncertain terms: "[W]e find that, given the virtual impossibility of proving the *lack* of the imputed secondary objective, this '*prima facie*' approach in effect constitutes the same old *per se* test which we have condemned in our prior opinions and which contravenes the rationale and spirit of *National Woodwork*." 521 F.2d at 890 n.9 (emphasis in original). We adhere to our statement in that case that "an employer's lack of legal control over the work the union seeks to preserve for its members cannot alone be decisive of the legality of the union's objectives. Indeed, we remain convinced that, *absent other evidence that a work preservation strike is actually intended to satisfy illegal secondary objectives, such a strike is lawful primary activity . . . .*" *Id.* at 894 (emphasis added).

In reviewing the totality of the circumstances in this case, the Board claims to have found such "other evidence" of illegal secondary objectives. The first piece of "further substantiation" mentioned in the Board's supplemental opinion is that "Simmons was without power to fulfill the desires of the Union to perform the work" and that it was thus "totally impossible for Simmons to carry out its responsibility to install the specified product, as guaranteed by the supplier, without either forcing the Hospital Association and the supplier to change the substance of their agreement as to guarantees—or else to effectuate a cessation of business." 201 NLRB at 71. We fail to see how this evidence constitutes "further substantiation" of illegal secondary objectives since it merely restates the right to control factor, stressing the impact on secondary employers of the refusal to hang the doors. But no matter how "severe the impact of primary activity on neutral employers, it [is] not thereby transformed into activity with a secondary objective." *National Woodwork Manufacturers Association v. NLRB*, *supra*, 386 U.S. at 627.

The second item of "further substantiation" noted by the Board was the fact that both Local 742 and its parent international union had a policy "not to install precut doors," which the Board considered "far more indicative of an objective directed at overall cessation of purchases from neutral manufacturers than at a specific primary dispute between the contractor here and a unit of employees seeking to achieve a desired set of working conditions from their primary employer." 201 NLRB at 71. The existence of such a policy simply cannot be considered evidence of an illegal secondary objective, however, since it is just as consistent with a finding of legitimate primary activity. For example, a union that attempts to preserve bargaining unit work by negotiating an explicit work preservation clause guaranteeing door preparation activity to jobsite carpenters is certainly pursuing a

policy against installation of precut doors. But such a clause is presumptively legal, and the clause and the policy do not in themselves indicate an illegal secondary objective. *National Woodwork Manufacturers Association v. NLRB, supra,* 386 U.S. at 644. On the other hand, a union that seeks clauses barring installation of precut doors in order to produce an adverse impact on a secondary employer for the purpose of winning benefits for the employees of that employer is in violation of Section 8(b)(4)(B). The actual issue in a Section 8(b)(4)(B) case is not the existence of such a policy, but whether the "Union's objective [in enforcing that policy] was preservation of work . . . , or whether [the boycott was] tactically calculated to serve union objectives elsewhere." *Id.* Therefore, we disagree with the Board's conclusion that evidence of such a policy substantiates the existence of illegal secondary objectives.[17]

Finally, the Board concluded that the union's illegal secondary objectives were "further fleshed out" by evidence that the union's business representative had made statements to the representatives of Simmons and to a newspaper reporter expressing concern over the "substandard" wages paid to the employees of the manufacturer of the premachined doors. 201 NLRB at 71. Certainly, the union's concerted refusal to install premachined doors would be unprotected secondary activity if the union intended to pressure the manufacturer of the doors into raising the wages of its employees. But we cannot find substantial evidence in the record to support the Board's finding that Local 742 intended to pressure the door manufacturer (Anderson).

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[17] We note parenthetically that a union policy against installation of all precut doors is more consistent with a finding of a primary work preservation objective than is a union policy of refusing to install only those precut doors supplied by particular manufacturers. *See* Enterprise Association, Local 638 v. NLRB, *supra,* 521 F.2d at 899-900 & n.35.

First, Foreman's statements concerning the wages paid to employees of Anderson must be read in light of the fact that the contract governing relations between Simmons and Local 742 contained a subcontracting clause that prohibited Simmons from subcontracting out unit work unless the subcontractor observed the equivalent of union wages. Foreman testified that he discussed the wages received by employees of Anderson only to make it clear that he thought that Simmons was violating this union standards clause. Such clauses are presumptively legal, and enforcement of the clause to preserve the work and standards for which the union has bargained is protected primary activity. *Meat & Highway Drivers, Local 710 v. NLRB*, *supra*, 335 F.2d at 715-16; *Truck Drivers, Local 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *Building & Construction Trades Council v. NLRB*, 328 F.2d 540, 541-42 (D.C. Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 538-39 (D.C. Cir. 1964); *District 9, International Association of Machinists v. NLRB*, 315 F.2d 33, 36-37 (D.C. Cir. 1962); *Retail Clerks, Local 770 v. NLRB*, 296 F.2d 368, 373-74 (D.C. Cir. 1961). Given the potential relevance of the union standards clause, Foreman's statements concerning substandard wages do not necessarily indicate a secondary objective.

Second, there is evidence in the record which indicates that Local 742 and other sister locals of the United Brotherhood of Carpenters had on prior occasions installed doors supplied by Anderson. In fact, the record indicates that on a prior Simmons project Local 742 had installed nonpremachined plastic-clad doors supplied by Anderson. There is simply nothing in the record to indicate any change in this willingness of Local 742 and its sister locals to install Anderson's nonpremachined doors. In this dispute, Local 742 merely insisted that Simmons cancel the balance of the order of premachined doors; the union never so much as even hinted that

Simmons should replace those doors with nonpremachined doors supplied by a manufacturer other than Anderson. Indeed, Local 742 expressly noted that it was willing to install plastic-clad doors that had been bevelled at the Anderson factory despite the fact that this task is one which has traditionally been performed on wood doors by carpenters at the jobsite.[18] This willingness to install both wood and plastic-clad doors that are supplied but not premachined by Anderson is no doubt influenced by the fact that doors manufactured by Anderson carry the United Brotherhood of Carpenters union label.

As a final matter, we stress that the Board was in error when it stated that "Simmons was without power to fulfill the desires of the Union to perform the work," 201 N.L.R.B. at 71, and that "[i]t was thus totally impossible for Simmons to carry out its responsibility to install the specified product, as guaranteed by the supplier, without either forcing the Hospital Association and the supplier to change the substance of their agreement as to guarantees—or else to effectuate a cessation of business." *Id.* The Board was aware, as we mentioned earlier, that the union had indicated that it would be willing to install the specified product if Simmons would negotiate the payment of a wage premium for each premachined door installed. Consequently, Simmons had three, rather than two, available options: (1) attempt to effect a change in the substance of the guarantee, (2) cease doing business on the project, or (3) negotiate the payment of a wage premium.[19]

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[18] *See* note 13 *supra.*

[19] This case differs in this important respect from the *Enterprise* case. In his Petition for a Writ of Certiorari in the latter case, the Solicitor General argues to the Court that the picketed employer "had available only two courses of action: it either could have induced [the general contractor] to change its requirements and specifications for the job,

It is our view that the willingness of the union to install the premachined doors in exchange for a wage premium—a willingness that was communicated to Simmons at the very start of the controversy over installation—substantially undercuts the Board's conclusion that the record indicates "union objectives elsewhere." [20] The facts of this case simply do not support a conclusion that "there is no possibility that the struck or picketed or threatened employer can resolve the dispute except by either forcing a secondary independently owned and operated business to take some action or by [sic] ceasing to do business with some other entity . . . ." *Id.* Indeed, resolution of the dispute through negotiation of a wage premium would have enabled the union to achieve its work preservation goal without any direct impact on employers other than Simmons. Surely the refusal of

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or failing that, could have terminated its subcontract with [the general contractor]." Petition at 12. He reaches that conclusion because in his view there was no indication that the union in *Enterprise* would have been content if the subcontractor had paid the union members premium pay for working on prefabricated units. Consequently, the Solicitor General takes the position that "[t]here is no occasion [for the Supreme Court] to consider whether there would have been a violation of Section 8(b)(4)(B) had the union merely demanded compensation from the [struck employer]." *Id.* at 12 n.7. The case *sub judice* raises the precise question bearing on the existence *vel non* of a violation which, according to the Solicitor General, is not present in *Enterprise.*

[20] Subsequent to the filing of the unfair labor practice charge by Simmons, the union *renewed* its compromise suggestion concerning premium rates of pay. The union indicated that it would be willing to hang the doors during the pendency of the unfair labor practice charge if Simmons would agree either to pay a specific premium or to negotiate a wage premium in the event the union prevailed in the unfair labor practice charge proceeding. It was only after Simmons failed to respond to these proposals that the union members began installing the doors. *See* text at note 8 *supra.*

Simmons even to enter negotiations on the wage premium issue does not justify the Board's failure to explain its finding of "union objectives elsewhere" given evidence of the union's willingness to negotiate.

III

We concluded our en banc opinion in *Enterprise* by noting that although "[t]he Board may fashion its own formulations as to the relevance of certain facts to *National Woodwork's* test for distinguishing primary from secondary activity," it may not "transform that test, directly or indirectly, into a vehicle for subverting the congressional purpose by focusing on only one among many potentially relevant factors." 521 F.2d at 905. Our problem with the Board's opinion in this case is that the right to control factor again appears, by its own force, to have played a decisive role. The Board does not attempt to indicate the "substance, history, and motivation" of the union's alleged dispute with Anderson, and identifies no significant evidence explaining why and in what manner the union intended to affect the labor relations of that employer. Moreover, the Board fails to deal with the significance of the union's willingness to accept premium pay in exchange for installation of premachined doors. In light of the fact that there is only insubstantial evidence in the record to support an 8(b)(4)(B) charge, we set aside the order under review and we remand the case to the Board for dismissal of the charges.

It is so ordered.

Local No. 742, United Brotherhood of Carpenters and Joiners of America, John Foreman, Business Agent and Harold Stolley, Steward *and* J. L. Simmons Company, Inc. Case 38-CC-50

January 5, 1973

SUPPLEMENTAL DECISION AND ORDER

On September 5, 1969, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent Union had committed violations of the National Labor Relations Act, as amended, within the meaning of Section 8(b)(4)(i) and (ii) and ordering that the Respondent Union cease and desist therefrom and take certain affirmative action. Thereafter, J. L. Simmons Company, Inc., the Charging Party herein, and the Respondent Union filed petitions for review and the Board filed a cross-application for enforcement of the Order. Thereafter, the entire matter came to be heard before the United States Court of Appeals for the District of Columbia.

On April 6, 1971, the court issued its decision [2] declining to enforce the Board's Order because, in the court's view, the Board's exclusive reliance on the right-to-control test in assessing the Union's conduct was impermissible. The court remanded the case to the Board for a new decision, "considering the union's objective 'under all the surrounding circumstances,' " and for further proceedings consistent with the court's opinion. Thereafter, on December 7, 1971, the Supreme Court of the United States denied a petition for certiorari filed by the Charging Party.[3]

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[1] 178 NLRB 351.

[2] 444 F.2d 895.

[3] 404 U.S. 986.

The Board, acquiescing in the court's view concerning use of the right-to-control test for the purposes of this case, accepted the remand. On January 18, 1972, the Board invited the parties to file statements of position and briefs on the issue remanded by the court. Such statements have been filed by the Respondent Union, the General Counsel, the Charging Party, and the Chamber of Commerce of the United States, as *amicus curiae*.[4]

Thereafter, the Board announced that it would hear oral argument and invited interested persons and organiaztions to seek leave to appear and argue and to file briefs. Oral argument was held before the Board on June 26, 1972.[5]

The Board has again reviewed the entire record in this case, including the statements of position, the briefs of interested persons and organizations, and oral argument before the Board and has decided to affirm its original Decision for the reasons hereinafter set forth.

On July 8, 1966, the Simmons Company entered into an agreement with the Decatur and Macon County Hospital Association calling for the enlargement of the latter's existing hospital facilities at Decatur, Illinois. Contract specifications required, among other things, the installation of plastic faced doors which were to be guaranteed for the life of the building. These specifications prohibited the cutting, routing, trimming, or mortising of the doors after their shipment from the manufacturer's plant and further provided that doors requiring modifications shall be returned to the factory for that purpose. Under the terms of the agreement, Simmons was bound to submit to the Asso-

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[4] The Renewed Motion to Intervene filed by the Chamber of Commerce is hereby denied as it raises no issues not previously considered.

[5] For the purposes or oral argument, this case was consolidated with *George Koch Sons, Inc.*, 201 NLRB No. 7. The names of the inteersted parties who participated in the oral argument and who filed briefs are set forth in our Decision in that case.

ciation both the name of the intended door manufacturer and detailed shop drawings for prior review and approval. Simmons ordered the required doors from the Anderson Wood Products Company.[6]

On December 1, 1967, shortly after the first shipment of doors arrived at the hospital project, the Respondent's business representative, John Foreman, accompanied by the steward, Harry Stolley, met with Vice President Robert Neal of Simmons. At the meeting, Foreman protested that the use of these doors would result in a diminution of work at the site of construction, otherwise available to the carpenters. Foreman insisted that the objectionable doors be replaced by laminated "slabs," that is, unfinished doors which are fitted and prepared for hardware at the project site. In support of his position, Foreman asserted that such slabs had previously been fitted, prepared, and installed at the Adolph Meyer Zone Center project in Decatur by construction site carpenters.[7] Neal distinguished the two projects by pointing out that the unfinished doors were guaranteed for 1 year only, whereas the doors here in question were required to be guaranteed for the life of the building. In the course of their discussion, Foreman also noted that the objectionable doors had been prepared by millworkers

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[6] Anderson conditioned its "lifetime" guarantee of these doors upon them being "premachined" at its factory where it had exclusive control over materials and workmanship. This process begins with a solid wood core which is crossbanded with a crossbanded veneer. Each door is then cut to size and the side edges beveled. A plastic covering is affixed to these edges and, next, to the two faces, under heat and pressure. Thereafter the door is routed for hinges and mortised for locks. The final step involves the application of a sealer to prevent moisture from affecting the exposed wood parts; namely, the top and bottom edges and the routed and mortised portions of the door.

[7] The record shows, however, that employees represented by the Respondent Union did, on at least one occasion, install "prefinished" doors at a Decatur project without protest.

who are employed at a lower wage scale than are the carpenters on construction sites.[8] He warned Neal that the Union would not hang the doors for the Company or permit any other contractor to do so. Neal, on his part, advised Foreman that Simmons was bound by the terms of its agrement to install the premachined doors and was, therefore, without the legal right to substitute doors more acceptable to the Union. The matter was not resolved.

On December 11, after Stolley refused to allow the carpenters to hang the disputed doors, Simmons' attorney, Paul Gebhard, telephoned Bernard Mamet, attorney for the Union, in an effort to resolve the controversy. Mamet suggested that the parties might negotiate the payment of a wage premium for each precut door installed, but otherwise declared that it was the policy of both the Respondent Local and its International not to install precut doors. Subsequently, charges were filed against the Respondent Union, alleging violations of the Act, and the doors were hung under protest.

The issue with which we are here faced is, as previously stated, narrowly drawn. On the foregoing facts, we must determine whether, as found by the Trial Examiner, the sole object of the Respondent's conduct was work preservation or whether, as the General Counsel asserts, such conduct was at least in some measure "tactically calculated to satisfy union objectives elsewhere."[9]

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[8] Anderson's employees are, however, represented by a union local affiliated with the United Brotherhood of Carpenters and Joiners of America.

Subsequently, Foreman characterized the controversy, according to Roland Frazier, a feature writer employed by a Decatur newspaper, as one involving doors "which had been manufactured in a shop which paid substandard wages, or wages that were lower than a carpenter should receive."

[9] See *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967).

In making this analysis, we bear in mind that it is the law of this case that we may not rely solely on a lack of control by the employer over the work the Respondent asserts it desires to "preserve." But we also note that this factor, in the view of the reviewing court, may be considered as a part of the total factual milieu which we must scrutinize in an effort to determine the objectives of the Respondent's conduct.

As we have explicated in considerable detail in *George Koch Sons, Inc.*, 201 NLRB No. 7, we do deem highly relevant to a determination of objective the question as to whether the struck or picketed employer has any power to grant the union's demands. For if the facts demonstrate that there is no possibility that the struck or picketed or threatened employer can resolve the dispute except by either forcing a secondary independently owned and operated business to take some action or by ceasing to do business with some other entity, then even though the union's conduct can be said to fall, in part, at least, under the rubric of "work preservation," we are inclined to find such a set of facts indicative of "union objectives *elsewhere*."

When, in accordance with the reviewing court's directive to us in this case, we look beyond this circumstance to the totality of the evidence here, we find further substantiation for the existence of such "union objectives elsewhere," and scant evidence that a primary dispute existed over genuine "work preservation."

We note first that Simmons was without power to fulfill the desires of the Union to perform the work. The work was not simply rendered unnecessary by the nature of the product which the Hospital Association had ordered, but if such work were performed on the jobsite, it would have destroyed the lifetime guarantee which the door manufacturer had agreed to with the Hospital Association. It was thus totally impossible for Simmons to carry out its responsibility to install the specified product, as guaranteed by the

supplier, without either forcing the Hospital Association and the supplier to change the substance of their agreement as to guarantees—or else to effectuate a cessation of business. These facts establish further evidence of the secondary nature of the Union's objectives.

There is, in addition, evidence that the Union was substantially motivated by a Local and International policy "not to install precut doors"—a characterization by the Union's own representatives which seems to us far more indicative of an objective directed at an overall cessation of purchases from neutral manufacturers than at a specific primary dispute between the contractor here and a unit of employees seeking to achieve a desired set of working conditions from their primary employer. When this is viewed in the further context of the Respondent's express concern over the "substandard" wages paid to the door manufacturer's employees, as evidenced by Business Representative Foreman's comments to Vice President Neal and to a newspaper reporter covering the controversy, we believe the evidence of "union objectives elsewhere" is further fleshed out.

In comparison, the countervailing evidence as to a primary work preservation objective seems scant. It is doubtful, first of all, whether the objective can fairly be called work "preservation" at all. There is no direct evidence that plastic-clad doors have ever, much less traditionally, been installed in this area by the Respondent's members. All the record shows in this connection is an unsupported assertion by Business Representative Foreman during a discussion that the type of work in issue had once been performed at the Adolph Meyer Zone Center project in Decatur. On the other hand, there is undisputed record evidence that members of the Respondent Union had on another occasion installed "prefinished" plastic-coated doors at another Decatur project. There is further evidence that premachined metal doors have been installed by the Re-

spondent's members with no claim having been asserted that jobsite fitting was an integral or traditional function of the Respondent's constituency. It is also clear that no contract clauses have ever been agreed to relating to the matter of installing prefabricated doors of any material, as guaranteeing that fitting work on such doors is to be done by unit employees. In fact, we find no evidence in this record that such matters have ever been discussed in the parties' negotiations.

Upon the totality of the record, then, we conclude that the preponderance of the evidence establishes a secondary purpose in the Union's actions relating to "union objectives elsewhere," and that there is only insubstantial evidence to establish the existence of a primary dispute between the Respondent and Simmons as to whether Simmons should have, or could have, assigned to the unit of employees represented by the Respondent any work to which they had either a traditional or contractual claim of right or practice.

In view of the foregoing, we shall, and hereby do, affirm our original Decision and Order finding that, by its conduct, the Respondent Union had violated Section 8(b)(4)(i) and (ii)(B) of the Act. We wish to make clear, however, that the above analysis is required by the law of this case, and, in the face of our respectful disagreement with the circuit court, should not be construed as inconsistent with our decision in *George Koch Sons, Inc., supra.*

MEMBER FANNING, dissenting:

In remanding the instant case to the Board for further proceedings, the court of appeals instructed the Board not to rely on a *per se* application of its so-called right-to-control test in determining the Union's objective here but rather to consider that objective under all the surrounding circumstances. And as the focus for this inquiry, the court cautioned the Board to ascertain whether the Union's ob-

jective was directed to the labor relations of its members' employer, i.e., Simmons, or whether it was directed elsewhere. Having carried out his analysis, I cannot agree with my colleagues that the evidence presented here supports a conclusion that the Union's objective had other than a work preservation aim, directed at other than the labor relations of Simmons. Hence, under the terms of the court's remand, I would dismiss the complaint in its entirety.

While my colleagues have made reference to certain statements of various of Respondent's representatives which read alone might suggest a proscribed object, I note numerous other occasions when Respondent's officials expressly couched their complaints about Simmons' conduct in purely work preservation terms.[10]

While I note also that the type of door here in question, the plastic-faced door, had only once before been used on a jobsite within Respondent's jurisdiction,[11] I also note the fact that Respondent's members had traditionally done the same work in dispute here on the often-used wood type of

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[10] The Administrative Law Judge found that Union Representative Foreman opened the December 1, 1967, meeting with Simmons' representatives with the comment that he thought there was a problem involving the doors since the mill had done work "that had been done in the past exclusively by the carpenters on the jobsite." In the course of the meeting, Foreman also told Neal, who was Simmons' representative, that it was Neal's responsibility to tell the mill that was manufacturing the doors "to stop doing [Respondent's] work." And Respondent's attorney, Mamet, in suggesting to Simmons' attorney that a solution to the dispute might be worked out whereby Simmons would pay a certain rate for each of the premachined doors hung, suggested this approach so that "the bargaining unit would be protected."

[11] It is true that, in that one instance, Respondent's members hung the prefabricated doors without objection. However, that incident was some 4 years prior to the one in question here and involved significantly fewer doors. In the circumstances of this case, I do not think this earlier incident constitutes a waiver of Respondent's work preservation claim here.

door, a door strikingly similar to the plastic-faced door here in dispute. Moreover, there is testimony in the record that the plastic-faced doors could have been worked on just as efficiently and well at the jobsite as in the factory, the only distinction being that the door manufacurer would not give its lifetime guarantee to the doors if such were done.[12]

I have also considered the absence of a contract clause covering the matter of installation of prefabricated plastic-faced doors as a factor militating against my conclusion that the Union's aim was solely work preservation. However, in light of the facts (1) that there is no disagreement that the work in dispute, if to be done on *wood* doors, traditionally has been done by the Union's members on the jobsite and (2) that there is no contract clause covering the handling of this work on wood doors either, I find no great significance in the lack of a specific contract clause covering the work on the plastic-faced doors.

In sum, I conclude that, viewed under all the surrounding circumstances,[13] the Union's objective was addressed to the labor relations of Simmons only and that such objective had as its sole aim the preservation of the union members' unit work. In such circumstances, in light of the court's remand instructions, I would dismiss this complaint in its entirety.

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[12] While the "lifetime guarantee" factor may have some surface appeal in constructing an argument that the Respondent's aim was not solely one of work preservation, such a factor in the final analysis does not direct itself to what the *Union's* object was but rather to the difficult position in which Simmons found itself because of the hospital's requirement for a lifetime-guaranteed door. As such, this factor is really an offshoot of the lack-of-control argument, and while I have considered it, I do not think it aids the mandated inquiry to any great degree.

[13] In addition to all the above factors, I have, consistent with the court's remand, also considered Simmons' lack of control over the decision as to the type door to be used. Such lack of control does not change my opinion herein, however.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,486

LOCAL NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, Business Agent, and HAROLD STOLLEY, Steward, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
J. L. SIMMONS COMPANY, INC., *Intervenor*

No. 24,346

J. L. SIMMONS COMPANY, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Decided April 6, 1971

JUDGMENT ENTERED THIS DATE

Mr. Bernard M. Mament for petitioner in No. 23,486.

Mr. Paul G. Gebhard, with whom *Mr. Arthur B. Smith, Jr.* was on the brief, for petitioner in No. 24,346 and intervenor in No. 23,486.

Mr. Frank Itkin, Attorney, National Labor Relations Board, of the bar of the Supreme Court of New Jersey, *pro hac vice,* by special leave of court, for respondent. *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Mrs. Abigail Cooley Baskir,* Attorney, National Labor Relaions Board, were on the brief for respondent. *Mr. Charles R. Both,* Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before WRIGHT and MACKINNON, *Circuit Judges,* and SMITH,* *Chief Judge,* United States District Court for the District of Montana.

Opinion filed by WRIGHT, *Circuit Judge.*

Concurring opinion filed by MACKINNON, *Circuit Judge.*

Concurring opinion filed by SMITH, *District Judge.*

WRIGHT, *Circuit Judge*: These cases concern one of the most important, but one of the most elusive, distinctions embedded in our labor law—the distinction between "primary" and "secondary" union activity under Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1964). J. L. Simmons Company filed charges against Local 742, alleging that the carpenters had violated that section in refusing to install prefabricated doors manufactured by another employer. The trial examiner dismissed the charges. He found that the union and Simmons were the primary parties to a dispute over work preservation and concluded that the union's pressure on Simmons was therefore permissible. However, the Board reversed, finding that Simmons was a mere "neutral" with respect to the hanging of prefabricated doors and that the union's actions thus amounted to a forbidden secondary boycott.

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* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1964).

The primary-secondary distinction, though originating in the common law, has never taken on very clear dimensions, and the Board has attempted to bring order out of the chaos by formulating determinate rules to guide its application. One of those rules—the "right to control" test—makes union activity secondary *per se* if the members' tmployer, subjected to pressure, lacks immediate "control" over the matter in dispute. That test was applied by the Board to this case, and its validity is at issue on appeal.[1]

This court and other courts have recently begun to criticize the "right to control" test. Guided by the Supreme Court's articulation of the primary-secondary distinction, we have cut back on the test's application and questioned its basic validity.[2] Yet the Board continues to defend the

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[1] Two other issues were raised by the union and J. L. Simmons Company. First, the union argues that there is not substantial evidence to support the Board's finding that Simmons lacked "control" to begin with—even if the "right to control" test is valid—and the test therefore should not have been applied to the facts of this case. The problem of what constitutes "control" under the Board's test is by no means simple. However, we do not reach this issue since we hold that the test itself is invalid and remand to the Board for reconsideration of "all the surrounding circumstances. On remand the Board will reevaluate the circumstances bearing on the "control" question if they are relevant to the union's objective under § 8(b)(4)(B).

Second, Simmons argues that the Board erred in failing to rule whether or not the company had a duty to bargain with the union over the work preservation issue. The union originally filed a charge against Simons alleging an impermissible refusal to bargain, but the Regional Office and the General Counsel refused to issue a complaint. The General Counsel did state that the union could urge its charge of a refusal to bargain as a defense to Simmons' § 8(b)(4)(B) charge. In its opinion, however, the Board did not speak to the question. To the extent the events surrounding the alleged refusal to bargain are relevant to the § 8(b)(4)(B) issue, we discuss them below, *see* page 16 *infra*, and the Board may reconsider them as some of the "surrounding circumstances" on remand.

[2] *See* pages 8-9, *infra*.

test *in toto*. It takes note of our previous decision undermining the test, but states only that "[w]e respectfully disagree with the Court's decision, for the reasons set forth in our brief therein, and, accordingly, we shall not burden the Court with a restatement of those views."[3] Fortunately, intervenor J. L. Simmons Company, Inc. has taken a more responsible approach to this appeal. It seeks to save only a part of the "right to control" test by arguing that the test was properly applied on the facts of this particular case which, it says, are significantly different from those in previously reported cases.

While administrative agencies, as a general matter, deserve praise for their efforts to structure discretion under such rules, we hold that in this instance the Board has gone too far. The "right to control" test is not appropriately suited to the statutory purpose it is meant to effectuate. The peculiar facts of this case do not cause us to alter that conclusion. We are convinced that the test, applied as a *per se* rule, must be entirely abandoned forthwith. Accordingly, we remand this case to the Board for further consideration.

I

Members of Local 742 of the carpenters' and joiners' union were employed by the J. L. Simmons Company which had contracted to build a new addition to the Macon County Hospital in Illinois. One of the carpenters' duties on the project was to hang new doors. This task might have been expected to provide a good deal of work for union members, for it generally involved not simply hanging but also prior preparation—trimming, routing, mortising and cutting—of the doors. The Board adopted a finding of the trial examiner that such preparatory work was "historical and traditional unit work of carpenters at the jobsite."[4] Yet

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[3] Brief for respondent at 9.

[4] Trial examiner's decision at 12. At the beginning of its deci-

in this case the carpenters were deprived of that part of the task; they were ordered by the Simmons Company to hang premachined doors, prepared at the factory rather than at the job site.

The initial decision to use premachined doors was made not by Simmons but by the Hospital Association through its architect's specifications. When Simmons originally contracted to build the hospital addition, in July of 1966, the specifications called for wooden doors to be prepared at the job site. But the contract also left the Hospital Association the option to require more expensive premachined doors should adequate financing become available. Thus by signing the contract Simmons agreed to install prefabricated doors if asked to do so. The company thereby bound its own hands, participating affirmatively in the crucial decision. In August financing did become available and a change order was issued calling for the premachined doors.

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sion and order, the Board adopted "the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith." 178 NLRB No. 54 at 2. Yet the only finding by the examiner which appears inconsistent with the Board's brief account of the facts is that relating to the "control" issue, *see* Note 1 *supra*, which the Board concluded was dispositive of the case. The Board thus appears to have adopted, though without specific discussion, the examiner's other findings, including the one regarding traditional unit work.

Because the Board similarly adopted almost all of the examiner's findings, it might be theoretically possible for us simply to reverse its decision and order. For example, the examiner found and the Board apparently agreed that the union's sole objective was to regain traditional unit work, an objective addressed only to the labor relations of the pressured employer. Under the primary-secondary analysis mandated by the Supreme Court and set forth hereinafter, pages 11-14, *infra*, that finding would be sufficient to exonerate the union under § 8(b)(4)(B). However, we have decided to remand this case rather than flatly to reverse the Board. We believe the Board's mistaken focus confined to the question of "control" may have led it to adopt findings which it may wish to examine more thoroughly when it applies the proper primary-secondary test on remand.

Simmons ordered 800 premachined doors from the Anderson Wood Products Company, and three months later 80 of the doors arrived at the construction site. A Simmons vice president, "suspecting that these prefabricated doors were going to become a problem," contacted the company's attorney for advice. And a carpenters' union business agent soon thereafter did raise very strong objections to the deprivation of traditional unit work. "After being apprised of the fact that premachining was required by the specifications, [he] stated that the [union's] members employed by Simmons Company would not hang, i.e. install, the doors." [5] Somewhat more than a week later, the company's job superintendent requested that a union member begin to hang some of the doors. But the carpenter replied that there was still "a problem" about them and refused.

The union's ground for refusing to install the premachined doors was that to do so would violate its bargaining agreement with Simmons. There was, however, no specific work preservation clause in the agreement relating to the machining of doors prior to hanging.[6] Thus the union had to rely on an *implied* agreement to preserve work traditionally performed by the carpenters on the job site—or, at least, an implied agreement to negotiate compensation when prefabricated doors are to be installed.

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[5] 178 NLRB No. 54 at 4-5.

[6] There were two much more general, but potentially relevant, clauses in the bargaining agreement. One required Simmons to "subcontract" work according to procedures specified in Local 742's local contract with the Decatur Contractors Association; the other required Simmons to recognize the jurisdictional claims of the carpenters. However, there was no highly specific work preservation clause such as the one in *Local Union No. 636, United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry* v. *NLRB*, ... U.S.App.D.C. ——, ——, 430 F.2d 906, 907 (1970) ("[a]ll pipe two inches (2″) and under and all hanger rods are to be cut, threaded, and installed by employees on the job").

After the first refusal to hang the doors, the union initiated several attempts to solve the problem through bargaining rather than litigation or continued confrontation. Its attorney got in touch with the company's attorney and suggested that the doors might be hung if the parties could negotiate a premium to be paid for the work lost. On more than one occasion this opening proposal was made, but the company gave no substantive response and proceeded to file an unfair labor practice charge against the union. Twice thereafter there were requests to hang the doors and similar refusals by the carpenters. Finally, when the company's unwillingness to negotiate a compromise solution must have been clear, the union gave in and hung all of the premachined doors in the hospital addition.

Both the trial examiner and the Board found that the union business agent's "threat" to refuse installing the premachined doors constituted restraint and coercion within Section 8(b)(4)(ii), and that the initial refusals to hang the doors constituted a "refusal in the course of * * * employment" under Section 8(b)(4)(i). However, the trial examiner found that no unfair labor practice had been committed under Section 8(b)(4). He concluded that the union had not acted with a "secondary" cease-doing-business objective violative of subsection (B). The Board reversed, finding that the carpenters' actions were indeed prohibited "secondary" pressure against Simmons. It relied *solely* on its "right to control" test. The *one* crucial factor, it said, was that Simmons had no control over the type of doors to be installed and thus over the substance of the union's grievance. In its formal opinion, the Board considered no other factors whatever in reaching its result. It concluded that simply because "control" lay with the hospital the "Simmons Company was a neutral with respect to the assignment of this work. Hence, the pressure exerted against Simmons Company, the secondary employer, was for the purpose of forcing it to cease doing

business with the Hospital and forcing the Hospital to cease doing business with Anderson Wood Products Company for the furnishing of premachined * * * doors."[7]

II

Only eight months ago, this court held in a similar case that exclusive reliance on the "right to control" test was impermissible. *Local Union No. 636, United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry* v. *NLRB*, —— U.S.App.D.C. ——, 430 F.2d 906 (1970). In that decision we directly followed our two other sister circuits which recently have spoken on the issue. *American Boiler Manufacturers Assn* v. *NLRB*, 8 Cir., 404 F.2d 556, 560-561 (1968); *NLRB* v. *Local Union No. 164, Int. Brotherhood of Electrical Workers*, 3 Cir., 388 F.2d 105, 109 (1968). In all of these cases, the union exerted pressure on its members' employer to regain unit work of which they had been deprived. In all of these cases, the Board had given dispositive weight to the fact that the employer was contractually bound to use prefabricated products. The only difference between this case and the previous cases is that here the union could invoke no specific work preservation clause in its agreement with the employer. The problem is whether this difference makes a difference. We conclude that it does not.

The defect of the *per se* "right to control" test is at its very core, its theoretical foundation. The test rests upon a narrow, mechanical—and mistaken—conception of the primary-secondary distinction. To label an employer as a "neutral" in a labor dispute involving his own employees, the test does not look to the substance of the dispute, to its history, or to its apparent motivation. It ignores all of these factors. And, instead, it focuses solely on whether the employer is immediately capable of granting the union

[7] 178 NLRB No. 54 at 4-5.

what it wants. If the employer is not capable of so doing, he is labelled a "neutral."

The artificiality of the test is particularly patent in cases such as this one—where the employees apparently have a grievance growing out of labor relations with their own employer (*i.e.*, loss of traditional unit work) and immediately provoked by an action of their own employer (*i.e.*, his signing of a contract which would deprive them of that work).[8] The Board does not stop to consider these aspects of the dispute. Nor does it look to see whether there may be other grievances, against other employers, which underlie the union's action. Rather, the Board seems to hold that, when an employer contracts away his power to satisfy union demands, he also contracts away his interest and involvement in the labor relations issue in dispute. He is depicted as the mere passive agent of others (*i.e.*, the party who required the prefabricated products and/ or the party who manufactures them); the fact that the present dispute has its origin and its substantive focus in his ongoing labor relations with his employees is deemed irrelevant. This Cinderella-like transformation of an obviously involved party into a neutral bystander is rather incredible.

The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it. The result goes far beyond the purpose of prohibiting secondary union activity: to limit the arena of economic conflict, to protect uninvolved, truly neutral parties from becoming

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[8] This characterization of the facts of the case is based upon the findings of the trial examiner, summarily adopted by the Board. We should stress once more that, on remand, the Board is free to review its previous acceptance of such fact findings. *See* Note 4 *supra*.

involved in labor disputes not their own.[9] Section 8(b)(4)(B), specifically limited to secondary activity, is not an escape hatch for an obviously involved employer. Its interpretation requires a more complete and more realistic conception of involvement in a labor dispute than the Board now provides. The substance, history and motivation of a particular dispute must not be ignored.

The importance of these substantive factors to the definition of secondary union activity has been authoritatively established at least since the Supreme Court's decision in *National Woodwork Manufacturers Assn* v. *NLRB*, 386 U.S. 612 (1967).[10] That case, like this one, concerned a dispute over work preservation, although there the dispute centered on a specific work preservation clause in the bargaining agreement. The Court spoke generally to the meaning of "secondary" activity under both Section 8(b)(4)(B) and Section 8(e). It prescribed the sort of inquiry which must be used to determine whether the pressured employer is but a neutral dragged into a dispute not his own:

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[9] For an extensive discussion of the "core concept" underlying the prohibition of secondary activity and the Taft-Hartley and Landrum-Griffin amendments dealing with such activity, *see National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U.S. 612, 619-644 (1967). *See generally* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ (8)(b)(4) and 8(e)*, 113 COLUM. [sic.] L. REV. 1000 (1965); Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962); Note, *Secondary Boycotts and Work Preservation*, 77 YALE L. J. 1401 (1968).

[10] The *National Woodwork* approach to the primary-secondary distinction was by no means revolutionary. The approach was well established, for example, in the jurisprudence of this circuit by the mid-1960's. *See Meat & Highway Drivers, Local 710* v. *NLRB*, 118 U.S.App.D.C. 287, 335 F.2d 709 (1964); *Truck Drivers Union Local 413* v. *NLRB*, 118 U.S.App.D.C. 149, 334 F.2d 539, *cert. denied*, 379 U.S. 916 (1964); *Orange Belt District Council of Painters No. 48* v. *NLRB*, 117 U.S.App.D.C. 233, 328 F.2d 534 (1964); Note, *supra* Note 9, 77 YALE L. J. at 1405-1409.

> "an inquiry into whether, *under all the surrounding circumstances,* the *Union's objective* was preservation of work for [unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case * * * the boycotting employer would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. * * * The touchstone is whether the agreement or its maintenance is *addressed to the labor relations of the contracting employer* vis-a-vis *his own employees.* * * *"

386 U.S. at 644-645. (Footnotes omitted; emphasis added.)

The *National Woodwork* Court did not apply the above primary-secondary reasoning to the "right to control" test, since the issue had not been presented.[11] But it is quite clear that the two are in fundamental conflict. The Boaord's test flies in the face of *National Woodwork* in three respects: (1) It elevates one circumstance—where the immediate "control" lies—to *per se* status, rather than evaluating "all the surrounding circumstances." More than mere form is at stake here. The Supreme Court properly recognized that realistic assessment of a union's objective in a particular situation is a complex, subtle matter and must depond on a variety of evidential factors. A mechanical *per se* rule simply cannot sift and weigh the evidence with the required sensitivity. (2) A more basic failing of the "right to control" test under *National Woodwork* is that it focuses on entirely the wrong set of circumstances. It is concerned solely with which party presently has the power to satisfy the union's objective, rather than focusing on the substance of the objective itself.[12]

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[11] The Court noted specifically that the "right to control" issue had dropped out of the case. 386 U.S. at 616 n.3.

[12] *National Woodwork* makes the union's "objective" the keystone of primary-secondary analysis. It should be clear that mere statement of the union's professed objective does not end the inquiry. When the Court spoke of "all the surrounding circum-

Thus it misses the point of the primary-secondary distinction as set forth in *National Woodwork*. (3) And, more particularly, the Board's test fails to evaluate the substance of the union's objective by looking to see whose labor relations it is addressed to. That is the crucial matter under *National Woodwork*. If the union's grievance has to do with some third party's relations with *his* employees, the pressure it exerts against its members' employer may well be secondary.[13] But *National Woodwork* makes clear that, if the grievance has to do with the labor relations of the pressured employer with his own employees who are exerting the pressure, then the activity is probably primary and permissible under Section 8(b)(4)(B). The Supreme Court also held that an objective of preserving traditional work for the union's members with the pressured employer is definitely primary. The fact that the employer may have to cease doing business with another party to satisfy the union's demand is a permissible ancillary effect.[14] Of course, there may be cases

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stances," it means that the Board must concern itself also with evidence of actual motivation on the union's part, the historical origins of the dispute, and other factors filling out a realistic picture of the actual grievances animating the labor conflict in question.

[13] The paradigmatic example of secondary activity is a union's pressurizing of its members' employer to cease dealing with another party simply because the other party does not employ union labor; in that case, the union's objective is addressed strictly to the labor relations of *another* employer. There is no indication in the record of this case that the carpenter's union had any concern with the labor relations of the Hospital Association with *its* employees or of the Anderson Wood Products Company with *its* employees.

[14] The distinction between a union's objective in exerting pressure and possible ancillary effects of that pressure not a part of the objective itself is not a difficult one. *National Woodwork* holds that the union's objective must be tested by asking whose labor

where the union's objective is not clearly, or only partly, to preserve its members' work. But the *per se* "right to control" test would declare an activity to be secondary without any injuiry whatever into such matters.

Each of the circuit decisions, *supra,* rejecting the Board's test has found the test to be irreconcilable with the primary-secondary analysis of *National Woodwork.* In *Local Union No. 636, supra,* we stated that "the Board's application of the 'right to control' test completely ignores the teaching of the Supreme Court in *National Woodwork* * * *." —— U.S.App.D.C. at ——, 430 F.2d at 909. The above discussion in this opinion is designed to reinforce that conclusion. We concluded before that "the 'right to control' test must be abandoned." —— U.S.App.D.C. at ——, 430 F.2d at 910. We do not retreat from that position.

Because the defect of the "right to control" test lies at its very core, the particular fact situations to which it is applied are inconsequential to its validity. It may be useful, however, to discuss briefly the extent to which the facts of this case vary from those that went before. In addition to the dispositive discussion of *National Woodwork,* our opinion in *Local Union No. 636* analyzed more narrowly the equities in the particular case. We emphasized the fact that the employer there had signed a specific work preservation clause in his labor agreement and that he could have avoided the labor conflict by respecting that agreement. His first duty, we said, was to honor a contract already signed with the union rather than to hold to a conflicting contract later signed with a third party.

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relations it was addressed to—not which parties may be somehow affected by it in their business dealings. Once again, we emphasize that the key is the *substance* of the union's grievance. *See* our discussion of this matter in *Local Union No. 636, supra* Note 6, ... U.S.App. D.C. at ——, 430 F.2d at 910.

This narrow line of reasoning, of course, does not precisely apply to the facts of the case now before us. There was no specific work preservation clause in the bargaining agreement here. Thus the intervenor, J. L. Simmons Company, argues that it is unfair on these facts to allow the union to exert the pressure that it did. However, continuing for the moment in the balance-of-equities framework, we may note that Simmons was by no means caught by surprise when a problem developed over installation of prefabricated doors. Indeed, the trial examiner found that a Simmons vice president anticipated the dispute and sought legal advice even before the union made its objection known. Since the preparation of doors on the job site was historical and traditional unit work, Simmons surely had notice of the impending conflict when it signed its contract with the Hospital Association.

It is true that there is no question here of honoring the letter of one contract over another, since the labor agreement was apparently silent on the work preservation issue. But is an established and fundamental principle of labor law that labor-management contracts are not to be read with narrow precision. In the words of the Supreme Court, they call "into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). " 'One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages.' " *Ibid.* "Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." *Id.* at 580. Thus the silence of Simmons' labor agreement as to work preservation does not take that agreement out of the picture. If the "practices of the particular industry" may be read into the common law of the agreement, then the preservation of traditional unit work has substantial status under Simmons' contract with

the carpenters' union.[15] Not only the Hospital Association, but also the union, had a contractual claim on Simmons. And the union's claim was the prior one.

We do not intend to hold that preservation of the door-preparation work was necessarily to be implied into the labor agreement. But we do believe that it had an important status under the agreement. If labor peace is the overriding goal of our labor laws, it seems clear that peace would have been best preserved here if Simmons, after unilaterally signing a contract which it should have known would deprive its employees of work traditionally theirs, had been willing to stop and bargain with the union over the prefabricated door issue, rather than refusing to hear of any compromise. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).[16] Even after creating the conflict, Simmons was, after all, not completely without resources to work out a

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[15] We note the trial examiner's finding that prefabricated doors, such as those at issue here, had been installed only once in the area before the building of the hospital annex. It is hardly surprising that the carpenters' bargaining agreement was silent on a matter which had almost never arisen before. As new sorts of prefabrication are developed, we may expect that similar situations—of disputes arising over work preservation in the absence of specific clauses in the agreement—will become increasingly common. Employee's rights should not be lost automatically simply because new advances in technology or industry practice were not specifically foreseen.

[16] As we have already noted, *supra* Note 1, there is no refusal to bargain issue in this case, as no § 8(a)(5) complaint was issued. That issue, and the applicability of *Fibreboard* to this type of fact situation, must await future litigation before the Board and in the courts. Our comments are directed only to the general balance-of-equities analysis. In that context, we find persuasive the trial examiner's "candid opinion that, if there had been more bargaining collectively and fewer unfair labor practice charges filed in the instant matter, everybody would have been better off financially—except, undoubtedly, the lawyers." Trial examiner's decision at 19.

solution to the dispute. Some financial compensation, for example, could have been paid to the employees in return for hanging the prefabricated doors. In the interest of labor peace, the union also would have been best advised to forego all "threats" and to stick exclusively to rational bargaining.

Finally, however, we must emphasize that this discussion of the equities of the situation is not dispositive of this case. The dispositive consideration—and the consideration which dictates the abandonment of the *per se* "right to control" test—is the process of inquiry prescribed in *National Woodwork, supra,* to govern the primary-secondary question. Neither the Board's view nor our own view of what is, broadly, fair or unfair may be put into effect using the vehicle of the Section 8(b)(4)(B) prohibition of secondary pressure. *See NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 497-498 (1960). If the presence or absence of a specific work preservation agreement is to make a difference, it can only be as one of many "surrounding circumstances" used to determine what the "*union's objective* was. It may be, for example, that when the union acts to enforce a specific clause, its objective more clearly relates to its labor relations with the primary employer. But the absence of such a specific clause is obviously not enough by itself to indicate a secondary objective relating to another employer. We note that the focus of *National Woodwork* is whether the union's objective was directed to the labor relations—not simply the specific contractual provisions, but the labor relations generally—of the union members' employer. There is, then, no bright line protecting employers such as the Simmons Company. Full immunization of an employer who desires to contract with a third party to install prefabricated products must be left to future bargaining agreements or future congressional mandates.

Hence we remand this case to the Board for a new decision, considering the union's objective "under all the sur-

rounding circumstances." Of course, if it throws any light on the union's objective, the Board may consider Simmons' lack of "control" as one of those circumstances. It may also consider the absence of a specific work preservation clause to the extent that that bears on the substance of the union's objective. We emphasize once more, however, that as a *per se* rule the "right to control" test must be finally abandoned.

Remanded for further proceedings.

MacKinnon, *Circuit Judge*: I concur in the foregoing result and in the opinion, however, I wish to state my view that the mere absnce of a work preservation clause in a collective bargaining agreement is not a sufficient fact to authorize the Board to completely dispose of the case by use of a *per se* "right of control" test. Further, that nothing we have said concerning the absence of a work preservation clause should be construed as indicating our opinion as to the inferences to be drawn from that fact when the Board, on remand, considers all the circumstances of the case. At that time the Board should consider all the facts and come to its own conclusion after considering all possible tests of the union's objectives.

Smith, *District Judge, concurring specially*: I agree with Judge Wright's conclusions as to the "right to control" test and concur in the remand.

I think, however, that the Board should initially interpret the Collective Bargaining Agreement and I do not join in that part of the opinion which deals with the interpretive problems.

178 NLRB No. 54

D-1572
Decatur, Ill.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

LOCAL NO. 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT AND HARLD STOLLEY, STEWARD

AND

J. L. SIMMONS COMPANY, INC.[1]

Case 38-CC-50

DECISION AND ORDER

On July 12, 1968, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent Local No. 742, United Brotherhood of Carpenters and Joiners of America had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Charging Party filed exceptions to the Trial Examiner's Decision and briefs in support thereof, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial

[1] Herein referred to as Simmons Company or the Charging Party.

error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,[2] the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

On July 8, 1966, Simmons Company entered into an agreement with the Decatur and Macon County Hospital Association [3] whereby the former agreed to construct an addition to the hospital in accordance with certain specifications. This agreement was for the contractor's (Simmons Company's) base bid as mentioned by Alternate No. 16 and Section 35 of the specifications, which provided for the installation of wood doors "in lieu of Plastic Faced Doors." This agreement further provided that within '. . . a period of sixty days from the date of July 1, 1966, the Hospital should have the "option of reinstating work deleted by alternates. . . ."

By Contract Change Order No. 2 General, accepted by Simmons Company, the Hospital opted on August 15, 1966, for the deletion from the contract of Alternate No. 16. The consequence of this change order was to bring into effect paragraph 1.a. of Section 35 of the specifications which, as the Trial Examiner found, provided for plastic faced doors which carry a lifetime guarantee and are premachined, i.e. cut, routed, trimmed, and mortised at the factory.[4] Sim-

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[2] We specifically disavow the gratuitous and wholly unwarranted remarks of the Trial Examiner regarding members of the legal and architectural professions.

[3] Herein referred to as Hospital.

[4] We find it unnecessary to the decision in this case to rule on the Trial Examiner's findings that the wood doors were not to be premachined, and that the change to plastic faced doors resulted in a $12,000 savings for Simmons Company. If it were necessary, we would find, based on the language of the specifications itself and the absence of any relevant extrinsic evidence to

mons ordered the required doors from Anderson Wood Products Company.

In November 1967, 80 premachined plastic faced doors arrived at the construction site. Thereafter, on December 1, 1967, Foreman, a Local 742 business agent, told Neal, Vice President and Manager of the Decatur Building Division of Simmons Company, that the premachined doors were in violation of the local area agreement.[5] After being apprised of the fact that premachining was required by the specifications, Foreman stated that the Respondent's members employed by Simmons Company would not hang, i.e. install, the doors. Respondent claimed that routing, boring, and mortising, work that the specifications required be performed by the manufacturer, belonged to the jobsite carpenters. There followed on or about December 11, 1967, and January 30 and 31, 1968, refusals to hang the doors. On these occasions Dyslin, a job superintendent for Simmons Company, asked Stolley, the union steward and Respondent's agent, to hang the doors. On all three occasions Stolley refused.

On December 11, 1967, subsequent to Stolley's refusal to hang the doors, Mamet, Respondent's attorney, suggested to Gebhard, Simmons Company's attorney, that an economic solution be worked out whereby the doors would

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the contrary, that paragraph 1.c. of Section 35 of the specifications applied to both paragraph 1.a., dealing with plastic faced doors, and paragraph 1.b., dealing with wood doors, and required that the latter as well as the former be premachined. It follows that there was thus no "financial bonanza" to Simmons Company by virtue of the change from wood doors to plastic faced doors.

[5] Simmons Company at all times material here was a party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Jointers of America whereby the former agreed to abide by the local area agreement between Decatur Contractors Association Inc., and Local 742. At the hearing herein Foreman stated that in his conversation with Neal he was referring to Article II of the local agreement which provides that Simmons recognize the jurisdictional claims of Respondent.

be hung if Simmons Company negotiated an additional rate of pay for each premachined door hung. Subsequent to the filing of the unfair labor practice charge herein by Simmons Company, Corbin, a representative of Respondent's International, proposal to Neal on January 10, 1968, that the doors would be hung but if the Respondent prevailed in the instant unfair labor practice proceeding, Simmons Company would either pay a specific premium or negotiate premium pay for hanging the premachined doors. When no substantive response to these proposals was received and after a letter from Neal dated January 31, 1968, further requesting that the doors be hung, Foreman informed Simmons Company by letter dated February 1, 1968, that Respondent would grant its members the right to install the doors. Respondent's members thereafter began installing the doors.

We find in agreement with the Trial Examiner that the above-described threat of Foreman not to hang the doors constituted restraint and coercion of Simmons Company within the meaning of Section 8(b)(4)(ii). We find in addition that the above-described refusals by union steward Stolley, also a Simmons employee, of superintendent Dyslin's requests to hang the doors constituted refusals, in the course of his employment by Simmons Company, to handle the doors or perform services within the meaning of Section 8(b)(4)(i). Contrary to the Trial Examiner, however, we find that these acts had a cease-doing-business objective violative of Subsection (B). We base this conclusion on the following reasons: The Decatur and Macon County Hospital required in its specifications that plastic faced doors premachined by the manufacturer by installed in the addition to the hospital. While Simmons Company had a choice, subject to approval by the architect, as to the manufacturer of the doors, it had no choice as to whether or not the doors would be premachined by the manufacturer. The Hospital was responsible for this decision and only it could change it. Simmons Company was a neutral

with respect to the assignment of this work. Hence, the pressure exerted against Simmons Company, the secondary employer, was for the purpose of forcing it to cease doing business with the Hospital and forcing the Hospital to cease doing business with Anderson Wood Products Company for the furnishing of premachined plastic faced doors; this was therefore secondary action which was unlawful under Section 8(b)(4)(i) and (ii)(B).[6] We so find.[7]

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. J. L. Simmons Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. J. L. Simmons Company, Inc. and Decatur and Macon County Hospital are persons within the meaning of Section 8(b)(4)(ii) of the Act.

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[6] See *Local 636, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Mechanical Contractors Association of Detroit, Inc.)* 177 NLRB No. 14; and *Pipe Fitters Local No. 120, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Cleveland)* 168 NLRB No 138. Contrary to the Trial Examiner, in *American Boiler Manufacturers Association,* 167 NLRB No. 79, the Board indicated no propensity to abandon the right of control doctrine.

[7] In view of our findings above, we find it necessary to decide whether a mere demand that a contracting company bargain with a union for premium pay to perform work on prefabricated products, such the the premachined doors in the instant case, would in and of itself be violative of Section 8(b)(4)(i)(ii)(B).

3. Local No. 742, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

4. By threatening J. L. Simmons Company, Inc. that Respondent's members employed by Simmons Company would not hang certain premachined plastic faced doors and by engaging in refusals to hang those doors, with an object of forcing Simmons Company to cease doing business with Decatur and Macon County Hospital and with Anderson Wood Products Company, Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of tht National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Local No. 742, United Brotherhood of Carpenters and Joiners of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening, coercing, or restraining J. L. Simmons Company, Inc. with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company, or any other person with respect to premachined doors.

(b) Engaging in a refusal in the course of employment to handle premachined plastic faced doors or to perform services for J. L. Simmons Company, Inc. with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company, or any other person with respect to premachined doors.

2. Take the following affirmative action which we find will effectuate the policies of the Act:

(a) Post in Respondent's business offices and meeting halls copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Subregion 38, after being duly signed by an official representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Subregion 38, signed copies of the aforementioned notice for posting by J. L. Simmons Company, Inc., if it is willing, in places where notices to employees are customarily posted. Copies of said notice, on forms provided by the Regional Director, after being signed by Respondent's representative as indicated, shall be returned forthwith to the Regional Director for disposition by him.

(c) Notify the Regional Director for Subregion 38, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., Sept. 5, 1969.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

NOTICE

To All Members of Local No. 742,
United Brotherhood of Carpenters and Joiners of America,
and to All Employees of J. L. Simmons Company, Inc.

PURSUANT TO

A Decision and Order of
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify you that:

WE WILL NOT threaten J. L. Simmons Company, Inc. that our members will refuse to handle premachined plastic faced doors with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company, or any other person, with respect to premachined doors.

WE WILL NOT engage in a refusal in the course of employment to handle for J. L. Simmons Company, Inc. premachined plastic faced doors with an object of forcing or requiring Simmons Company to cease doing business with Decatur and Macon County Hospital, Anderson Wood Products Company or any other person with respect to premachined doors.

WE Now notify our members employed by J. L. Simmons Company Inc. that we have no objection to their hanging premachined plastic faced doors at the Decatur and Macon County Hospital addition now under construction.

LOCAL No. 742,

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA
(Labor Organization)

Dated

By
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Subregional Office, 4th Floor, Citizens Building, 225 Main Street, Peoria, Illinois 61602 Telephone 309-673-9282.

(CAPTION OMITTED IN PRINTING)

TRIAL EXAMINER'S DECISION

Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on December 15, 1967, by J. L. Simmons Company, Inc., herein called the Charging Party or Simmons, the General Counsel of the National Labor Relations Board, hereinafter called the General Counsel [1] and the Board respectively, by the Regional Director for Region 38 (Peoria, Illinois), issued its complaint dated January 31, 1968, against Local No. 742, United Brotherhood of Carpenters and Joiners of America, John Foreman, Business Agent and Harold Stolley, Steward, hereinafter referred to as the Respondents, Local 742, or individually. The com-

[1] This term specifically includes the attorneys appearing for the General Counsel at the hearing.

plaint alleged that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended, herein called the Act. Copies of the charge, the complaint, and notice of hearing thereon were duly served upon the Respondents and the Charging Party.

Respondents duly filed an answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing was held a Peoria, Illinois, on April 16 and 17, 1968, before me. All parties appeared at the hearing, were represented by counsel, and afforded full opportunity to be heard, to produce, examine, and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. Oral argument at the close of the hearing was waived. Briefs were received on June 3, 1968, from the Respondents, Charging Party and General Counsel.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Finding of Fact

I. Business of the Charging Party

J. L. Simmons Company, Inc., is, and has been at all times material herein, a Delaware corporation with office and place of business located at Decatur, Illinois. It is engaged in the construction business.

By the terms of an agreement entered into on July 8, 1966, with the Board of Trustees, Decatur and Macon County Hospital Association (Hospital), Decatur, Illinois, the Charging Party is the general contractor for a project known as Additions and Alterations to Decatur and Macon

County Hospital, Decatur, Illinois, which is the only project involved herein.

The complaint alleged, the answer admitted, and I find, that J. L. Simmons Company, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Respondents

Local No. 742, United Brotherhood of Carpenters and Joiners of America is a labor organization admitting to membership employees of the Charging Party, John Foreman is its business agent and Harold Stolley is the Union's steward on the Hospital project.

III. The Alleged Unfair Labor Practices

A. *The Facts*

Sometime in the year 1965 the Board of Trustees, Decatur and Macon County Hospital Association, Decatur, Illinois, decided to enlarge its existing hospital facilities in Decatur. It had Dane D. Morgan and Associates, Architects, Burlington, Iowa, prepare plans and specifications for these additions and alterations to the existing hospital.

Due to certain problems of financing this project the architects drew these plans and specifications with a number of alternate options upon which the contractors bid.[2] In other words the hospital intended to opt the cheapest "alternate" in order to keep the total price of the project down until its financing arrangements could be expanded to cover the more expensive alternates.

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[2] As Robert G. Neal, vice president and manager of the Decatur Building Division of J. L. Simmons Company, Inc., put it, "I remember, at the time, I had the impression, well, here is a man that's in budget trouble, he's looking for money, but he's got high-priced ideas."

Section 35 of these plans and specifications, which is the root of the trouble here, became known as Alternate #16. Alternate #16 gave the Hospital the option of selecting either "plastic faced" doors or wood doors. Section 35 of the specifications read as follows:

PLASTIC FACED AND WOOD DOORS

1. SCOPE

a. Unless otherwise scheduled, all doors shall be Solid Wood Core Doors with Laminated Plastic Finish as herein specified and shall be identified herein as Plastic Faced Doors.

b. See Method of Bidding. Alternates shall be taken to furnish, install, and finish Solid Wood Core Doors with Flush Wood Veneer Facings, job finished, as herein specified in lieu of Plastic Faced Doors. Flush wood veneered doors are identified herein as Wood Doors.

c. Each door to be factory fit and beveled to net opening sizes and shall be factory machined to satisfy the entire hardware schedule, except for surface applied hardware which does not require shop preparation. No cutting, routing, trimming, or mortising shall be permitted after doors leave factory and doors requiring modifications shall be returned to the factory. In general, locksets to be mortise type, hinges to be butt type, and closers to be overhead type surface applied. Most doors to have metal edge strips which shall be mortised flush with face of door. Kick plates, push plates, and bumper plates to be surface applied. A copy of an approved finish hardware schedule plus templates of hardware items will be provided by the finish hardware supplier.

d. Contractor shall verify the name of the manufacturer of plastic faced and/or wood doors prior to negotiating a contract with this sub-contractor and

shall provide detailed shop drawings showing doors, sizes, mortising, and details of glazed opening for review and approval.

2. Doors

a. All doors to be staved lumber core doors conforming to all requirements of Commercial Standards CS-171 as amended except doors with five inch stiles or rails which shall be stile and rail lumber core doors conforming to all requirements of Federal Specification LLL-D-581, Type 1, Style 11.

b. Each door to be guaranteed for the life of the building. Guarantee shall conform to the Standard One Year Door Guarantee of the National Woodwork Manufacturers Association except that the life of the guarantee shall be extended as above stated. Repair and replacement including rehanging and refinishing shall be performed at no cost to the Owner.

3. Plastic Faced Doors

a. Both faces and both long edges of each door shall be covered with an approved 1/16 inch righ pressure plastic laminate to meet the N.E.M.A. requirements and top and bottom edges shall be sealed with a laminated sheet plastic to minimize moisture content changes.

b. Colors and patterns of laminated plastic to be as selected by Architect.

4. Wood Doors

a. Face veneers and solid stock edge bands of doors located in rooms where walnut panelling is scheduled shall be premium grade plain sliced black walnut. Face veneers and solid stock edge bands of all other wood doors shall be premium grade plain sliced red oak.

b. All exposed surfaces shall be smoothly sanded and covered. Wood doors to be job finished.

5. HANDLING AND PROTECTION

a. Doors shall be packaged, handled, and stored in a careful manner. They shall be protracted from moisture and high humidity and shall at no time be exposed to inclement weather.

b. Each door to be numbered to correspond to its assigned opening. No job cutting, trimming, or patching will be permitted.

c. After doors are hung, they shall be finished without delay and shall be protected from damage. Doors shall not be wedged open. Upon completion of project, any door with surface defects, split faces or edges, or noticeable scratches shall be rejected and replaced at no change in contract cost.

On June 2, 1966, the bids on this project were opened and the Charging Party, Simmons, proved to be the low bidder.

On July 8, 1966, the Hospital signed a contract witth Simmons whereby Simmons agreed to purchase the materials and build the additions and alterations according to specifications for a sum of $2,961,100.

As of the date of the execution of this agreement the Hospital had opted under Alternate #16 the installation of the wood doors which, according to the Simmons' bid, constituted a $12,000 saving over the use of the plastic doors. However, Anderson Wood Products Co., the supplier of the doors in either case, had agreed to supply Simmons with the specified plastic doors for only $10,000 more than the wood doors even though this Anderson bid further specified that "Wood doors under Alts. 16, 17 and 18 are not prefinished and worked for hardware." [3]

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[3] Anderson read the specifications, quoted *supra*, as requiring only blank wood doors which were not prefabricated or premachined at its factory.

There is little question but that the Hospital at all times intended, as soon as the financing could be arranged, to have the plastic doors installed rather than the wood doors because of their supposed cheaper maintenance. However, at the time of the execution of the contract, the Hospital had chosen the wood doors, thereby, according to the Simmons' bid, saving $12,000.

On August 9 and 15, 1966, Simmons held two prejob conferences with the business representatives of the various construction unions which would be involved in the project. At the second meeting Simmons presented John Foreman, president of the local Building Trades Council and also business representative of Carpenter Local 742, a copy of the inch and one-half thick plans and specifications of the project for the use of these unions. Otherwise the record shows that there was no talk about these plans and specifications for the reasons that these meetings apparently were really only "get acquainted" meetings and, besides, Gordon L. Dyslin, Simmons' job superinttndent on the Hospital project, had just been employed by Simmons on August 8, and admittedly had not read the plans and specifications himself.

However, on August 15, 1966, Change Order No. 2, which increased the price of construction to $3,543,250, was accepted by both Simmons and the Hospital. Among the other changes made by this Change Order No. 2 was one involving Alternate #16 whereby the Hospital ordered the prefabricated, factory machined, lifetime guaranteed,[4] plas-

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[4] Anderson's "lifetime guarantee" read as follows:

> Doors made by Anderson Wood Products Company, are clad with Formica laminated plastic, and made of the finest materials and workmanship. They are free from defects that render them unserviceable or unfit for the use for which they were intended. If properly stored, handled, installed and maintained, these doors are guaranteed against defects in materials and workmanship for the life of the installation. A warp or

tic covered doors in lieu of the previously ordered wood doors. No copy of this Change Order No. 2 nor any indication thereof was ever given to the Union.

As of the time of this project, Simmons had no direct contractual relationship with Local 742 of the Carpenters' union but did have at all times material here a contract with the International United Brotherhood of Carpenters and Joiners of America by which Simmons recognized the jurisdictional claims of the United Brotherhood and agreed to observe the working conditions and wages established in the local community. The local agreement applicable here was between the Decatur Contractors' Association, Inc., and Local No. 742 and contained the following two clauses:

> Any Employer who sublets any of his work must sublet such work in accordance with the current procedural rules of the Nat'l. Joint Board in effect at the time a dispute may occur. Any Employer who sublets any of his work must sublet such work subject to the provisions concerning wages, hours and working conditions as hereinafter set forth in this contract.

Anderson Wood Products Company, the suppliers of the doors involved herein, on the other hand had a contract covering its employees with the Carpenters' Local in Louisville and its doors, whether plastic covered or wood, carried the Carpenters' union label.

With one exception labor relations on the project appear to have gone well. However, in September 1967, Carpenter Stewart Harold Stolley and the other six or seven carpenters then employed on the job refused certain work because of a jurisdictional dispute with the result that Simmons

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twist of not to exceed ¼ inch, determined by procedure No. CS 171—58 of the U.S. Dept of Commerce, shall not be considered a defect. Any door found not to meet this guarantee will be repaired or replaced without charge (including reasonable labor cost) by the manufacturer.

discharged three of the carpenters including the steward. Respondent Union filed charges of unfair labor practices against Simmons because of these discharges. With Attorney Gebhard representing Simmons and Mamet representing Local 742, this unfair labor practice case was settled by an agreement reinstating Stolley and the other two carpenters previously discharged and providing for their "continued employment."

By the end of October, following the reinstatement of the carpenters in accordance with the settlement agreement, Respondents had reduced the number of carpenters employed at the Hospital project to two: Steward Stolley and Oestrich. The other carpenters previously employed had been transferred to other Simmons' projects.

About mid-November 1967, and several weeks before they were needed, approximately 80 of the plastic premachined doors were delivered at the Hospital project. Although the project required only about 650 such doors, it was thought as of November that some 800 doors would be required.

With one exception, the 1963 Mid-America Building project in Decatur, the doors involved here were the first plastic covered, premachined doors on any project in the jurisdiction of Local 742. On the Mid-America Building 12—20 such formica covered, premachined doors had been hung by Local 742 without objection.

Steward Stolley, having noted that these formica clad doors were factory premachined, called this matter to the attention of John Foreman, business representative of Local 742, who in turn requested the advice of Attorney Mamet. Mamet advised Foreman that "there was a Supreme Court Decision [5] upholding the position that you've got the right to refuse to install these doors and that they are bargaining unit work, and you can protect the dimuni-

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[5] *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967).

tion of the bargaining unit." Mamet further advised, "Why don't you [Foreman] go in there and see if you can talk to them [Vice President Neal of Simmons], and, particularly, since you only have 80 doors . . . why don't you tell them you'll install these 80 doors and give them an opportunity well in advance to cancel the additional 800, the balance of the 800?"

Even earlier, on November 18, Vice President Neal, suspecting that these prefabricated doors were going to become a problem, had written Simmons' attorney for advice on the matter.[6]

Acting upon Mamet's advice, on December 1, Foreman telephoned Neal requesting a meeting about 10:30 a.m. Foreman appeared at this conference accompanied by Stolley. Neal called Algie Brannon, a Simmons' job superintendent on another project, to sit in on the conference. Foreman opened the conversation by stating that he thought there was a "problem" involving these doors because the mill had done work that had been done in the past exclusively by the carpenters on the jobsite. Foreman maintained that this was a violation of the local agreement. Neal got out a copy of the local agreement and asked to be shown where the violation was. Foreman stated, "It's in there, it's in there" but failed to point to any particular provision of the agreement.[7] Neal then explained that Simmons was bound by the specifications of the project and installation of premachined formica faced and edged doors. Neal reiterated that his company "had no control" over the doors. Stolley maintained that "Doors are doors" and asked why the plastic doors installed at the Adolph Meyer Zone Center had been prepared on the site. Neal explained that in the

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[6] This letter is not in evidence because a claim of attorney-client privilege was raised and sustained at the hearing.

[7] At the hearing Foreman testified that the was referring to the clauses of the local agreement quoted, *supra*.

Meyer project there were no specifications requiring premachined doors. There was some discussion of the formica faced doors used in the Commons Building at Carbondale, Illinois, which had also been fabricated on the jobsite. Neal explained that the doors at Carbondale were guaranteed only for 1 year contrary to the specifications in the Hospital project so that the Company had purchased the Carbondale doors as "blank doors" and prepared them in the field. Foreman stated that it was the Union's position that the carpenters had been deprived of the work of fitting and machining the doors on the jobsite and that, on the advice of counsel, he was informing Neal that the Union "would not hang" the formica doors for the Company or permit any other subcontractor to do so. Foreman pointed out that the doors had been prepared by mill employees who received lower wages than the carpenters on the jobsite. Prior to the conclusion of the meeting, Foreman advised Neal that, on advice of counsel, he would hang the 80 formica doors that had arrived but "it was his (Neal's) responsibility to tell the mill that was manufacturing the doors to stop doing our [Local 742] work." The meeting ended with both Neal and Foreman deciding to leave the settlement of the matter up to their respective attorneys.

The next overt move in this dispute occurred on December 11 when, on orders of Robert Neal, Job Superintendent Gordon Dyslin, accompanied by Simmons' Estimator Robert Briscoe and Carpenter Foreman Catlin, met by previous appointment with Steward Stolley and carpenter Oestrich at 12:30 p.m. in the intensive care unit where Dyslin requested Stolley and Oestrich to hang three formica clad doors on the ground that the Hospital was pressing for the completion of this unit. Stolley asked, "Didn't Mr. Neal tell you not to hang these doors?" and reminded Dyslin that there was still "a problem" regarding these doors. Dyslin denied that Neal had told him anything about the doors and again requested the carpenters to hang the doors. Stolley refused to do so until the matter had been

finally settled. Dyslin then ordered the carpenters back to the work they had been doing prior to the meeting in the intensive care unit.

Just before 5 p.m. that same day, after a long telephone call from Neal regarding the "refusal" of the carpenters to hang the prefabricated doors, Simmons' attorney, Paul Gebhard, telephoned Mamet and advised Mamet that "his boy Foreman" was refusing to hang the prefabricated Anderson doors. Mamet, acknowledging that he was the Local's attorney and had been previously advised of the problem by Foreman, asked Gebhard if he had read the *National Woodwork* case. Gebhard answered that he had but that the case was not controlling because, in the instant matter, the architectural specifications required the prefabricated plastic doors and thus deprived Simmons of "control." Mamet voiced surprise that the specifications called for premachined plastic doors saying that this was the first he knew of this but assured Gebhard that Local 742 intended no product boycott. Mamet stated that it was the policy of the Local and the International not to install precut doors so that it would do Gebhard no good to check with the International about that. Gebhard stated that he thought the Respondents' position was a clear violation of law and Simmons would have to file a charge. Mamet suggested that "a possible solution could be worked out where you could go ahead and hang your doors, and yet the bargaining unit would be protected" by negotiating a rate of pay additional for each of the premachined doors hung. Gebhard answered that this "sounds to me like a payment for work not performed" because there would be no work done by any one on the jobsite. Mamet further suggested that any such suggestion of premium pay should be made by Gebhard to Simmons as Gebhard's own idea because of several cases Mamet had had against Simmons in the recent past. Gebhard answered that, while this didn't change his thinking, he would do some further checking

on it and would "get back to Mamet" if the Company changed its position or if he heard anything different.[8]

At 5 p.m on. December 13, 1967, Simmons telephoned the following telegram addressed to John Foreman to Western Union:

> AS WE ADVISED WHEN YOU CAME TO OUR OFFICE ON DECEMBER 1ST, PURCHASE AND INSTALLATION OF FORMICA DOORS ON DECATUR AND MACON COUNTY HOSPITAL PROJECT WAS REQUIRED BY ARCHITECTS SPECIFICATIONS. WE HAD NO CONTROL OVER SPECIFICATIONS REQUIRING PURCHASE OF THESE DOORS. ON DECEMBER 11, 1967 WE REQUESTED CARPENTERS TO INSTALL THESE DOORS AND TO DATE THEY HAVE REFUSED. THEREFORE WE ARE FILING UNFAIR LABOR PRACTICE CHARGES WITH NATIONAL LABOR RELATIONS BOARD.

No doubt this telegram was delivered by the following day.

On December 15, 1967, without having "gotten back" to Mamet, Gebhard, on behalf of Simmons, filed the charge against Local 742 in the instant matter. Mamet was so notified by a telephone call from the Subregional Office in Peoria

On December 19, 1967, Local 742, by Attorney Mamet, filed an unfair labor practice charge against Simmons claiming that Simmons had violated the settlement agreement in Case 38—CA—378 by laying off employees; by subcontracting bargaining unit work without negotiating

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[8] The above findings constitute a consensus of the testimony of Attorneys Gebhard and Mamet as to their conversation. There were several conflicts between the two, but, fortunately, none vital enough to a decision of this matter to require a credibility determination by this Trial Examiner.

with Union; and refusing to negotiate a rate for the installation of the prefabricated doors. The Regional Office's refusal to issue a complaint upon this charge was affirmed on appeal to the General Counsel with the comment that Respondent could urge its charge of a refusal to bargain by Simmons as a defense to the complaint already issued on the Simmons' charge against Local 742.

Also on December 19, Neal received a telephone call from Duff Corbin, International representative of the Carpenters, who told Neal that he, Corbin, was aware of the urgent need to complete the intensive care unit and so he had made arrangements to have the three formica doors hung in that unit. Neal expressed his appreciation and added that Simmons, "of course, looks forward to having this complete situation resolved, so we can proceed with the hanging of all the doors." To this Corbin answered that he "felt the situation would be resolved the first of the week, which would allow us to proceed with the hanging of the doors, the balance of the doors."

Steward Stolley and Oestrich promptly thereafter hung the three prefabricated Anderson doors in the intensive care unit as had been thus agreed. None of the other prefabricated doors were hung at this time—nor was there any further request that they be hung at this time.

On January 10, 1968, International Representative Corbin, being at the Simmons' office on other business, got in touch with Robert Neal and presented him with two agreements prepared by Attorney Mamet which provided that the doors in question would be hung but that, in the event that the Union won the case before the Board, the Carpenter employees would either be paid an additional hourly premium of a stated rate for hanging the premachined doors or the parties would thereafter negotiate the premium to be paid the employees. Neal accepted the proposed agreements and told Corbin that he would review them and pass them on to his attorneys. This was the last heard of

these proposed agreements until they were introduced into evidence at the hearing.

On January 30, Gordon Dyslin, job superintendent, met Harry Stolley, carpenter steward at the project, on the south side of Hayes Street, and in the presence of Simmons' Bob Briscoe, asked Stolley if the carpenters were ready to hang the formica doors. Stolley answered in the negative, stating that the situation had not yet been straightened out. On the next day, January 31, at approximately the same time and location the previous scene was again repeated with Stolley again stating that the carpenters were not yet ready to hang the formica doors as the situation had not been straightened out yet. However at this time Dyslin gave Stolley a copy of the letter requesting the carpenters to proceed with the hanging of the doors, the original of which had been sent to Local 742.

This letter, dated January 31, 1968, read as follows:

> This letter constitutes a formal request by the J. L. Simmons Company, Inc. to the carpenters—Employees of the Simmons Company who are members of Local No. 742 of the United Brotherhood of Carpenters and Joiners of America, to proceed immediately with the work of installing on the above project the pre-cut formica clad, faced and edged doors manufactured by Anderson Wood Products Company, Louisville, Kentucky. These are the same doors that we have previously requested you to install on this project. As you know, installation of these doors is required by the architects' specifications. The doors have been on the job site and available for installation since November, 1967.

By letter dated February 1, 1968, Local 742, over the signature of John Foreman, answered as follows:

> After receiving your registered letter of January 31, 1968, regarding the installation of Pre Cut Formica-Clad Doors at the Decatur and Macon County Hospital project. To proceed immediately with the work of installing same, I will as Business Representative of the United Brotherhood of Carpenters and Joiners Local #742 do hereby grant the right of my members to install the above-mentioned product.
>
> I did try to reach you by phone and found you were out of town, so please consider this letter as formal notification.

Admittedly this was the first occasion that Foreman had instructed his members that they were free to install the premachined plastic doors.

Thereafter Stolley and Oestrich with other carpenters subsequently hired by Simmons proceeded to hang the doors in controversy. This procedure was continuing at the time of the hearing. There was no proof, however, that the delay on the hanging of the doors had delayed the completion of the project. There had been no strike or picketing over this matter.

B. *Conclusions*

It is axiomatic that, in order to prove a violation of Section 8(b)(4)(i) and (ii)(B) of the Act, it is incumbent upon General Counsel to prove that a union or its agents:

(1) Employed prohibited "means"; i.e.,

(i) "Induced or encouraged" employees to strike or refuse "to handle" any goods, or

(ii) "To threaten, coerce, or restrain" and employ;

(2) for a prohibited "object", i.e.,

(B) To force that secondary employer to cease doing business with another employer; and

(3) that said union action was not legitimate primary action.

The facts here show that both the Employer Simmons and Respondents recognized the existence of a problem between themselves over the premachined Anderson doors. While discussing this problem and, indeed, while suggesting remedies therefor to Vice President Neal and Attorney Gebhard respectively, Respondents' Business Agent Foreman and its Attorney Mamet both stated or clearly indicated that Local 742 would not hang these premachined doors because of their adverse affect on the unit work of the jobsite carpenters. Under decided Board cases these statements, although here perhaps considered considerably out of context, are technically sufficient to constitute prohibited "means" within Section 8(b)(4) of the Act. I hereby so find.

Although I make this finding here, I fear that this rule may well inhibit parties confronted with a problem of this sort from freely, openly, and frankly discussing it in ordinary day-to-day language one with the other in a bona fide effort to solve the problem. Such a rule tends to turn any earnest effort to find a peaceful solution to a problem into a game to see which one can entrap the other into an unguarded statement which might technically violate Section 8(b)(4), or some other section of the Act, so as to be able to run to the Board and file a charge rather than to locate a peaceful solution to the problem. It seems to this Trial Examiner that many labor lawyers tend to prefer to try lawsuits than to find peaceful solutions.[9]

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[9] Apparently this tendency leads to the good life for those specializing in labor relations, for Bar Association statistics indicate that labor lawyers eat "higher on the hog" than most of their

There is not much difference between premachined and blank doors but that difference has resulted in a great deal of trouble and much litigation. The difference referred to, of course, is the fact that the work of preparing blank doors for hanging and hardware is performed by the carpenters on the jobsite whereas, as the name implies, prefabricated or premachined doors come from the factory completely prepared for hanging and hardware thus eliminating much unit work and thereby taking money right out of the pockets of jobsite carpenters.

Regardless of the financial effect upon the jobsite carpenters, the change from blank wood doors to premachined formica doors at the Hospital project by Change Order No. 2 amounted to a financial bonanza to Simmons. In the first place the records show that Simmons charged Hospital $12,000 more for the premachined doors than for the wood doors although the premachined doors cost Simmons only $10,000 more, a clear $2,000 profit by reason of a paper change only. In the second place the fact that the formica doors were premachined whereas the wood doors were not amounted to a saving of approximately $12,000 for Simmons by reason of not having to pay the jobsite carpenters to prepare those doors for hanging and hardware.[10] Therefore Change Order No. 2 to the plans and specifications for this project alone made Simmons a clear profit of $14,000 consisting of the $2,000 from the Hospital and the $12,000 savings on pay to the jobsite carpenters.

In its brief Simmons presents the following argument:

> 3. *The Union Has Not Traditionally Performed the Work Sought.* The union seeks to defend its illegal

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brothers specializing in other fields. In my opinion this tendency does not otherwise lead to good labor relations.

[10] This $12,000 comes from not having to pay jobsite carpenters for 3 to 4 hours work per door on each of 650 doors at $5.05 per hour.

boycott by claiming that the disputed work was work it had traditionally performed. As stated above, even given a valid work preservation clause covering work that has been continuously and customarily performed by a union, attempts to enforce such a clause by means of a product boycott, where the employer does not control the disputed work, is proscribed secondary activity. Accordingly, the "traditionally performed" defense, which is essentially an 8(e) defense, has absolutely no relevance here. Nevertheless, the contention of the union herein as stated by its counsel [footnote omitted] is that the Board's "right to control doctrine" is erroneous, and further, that the union's activity here is protected because it was an attempt to precedents on the "right to control," it is obvious Setting aside for the moment the clearly established precedents on the "right to control," it is obvious from the record in this case that the union has not in fact traditionally performed the work which it now seeks.

There is no dispute over the fact that carpenters of Local 742 have traditionally performed the work of preparing wood doors of the type involved in the *National Woodwork* case. Nor is there any dispute over the fact that they have *not* traditionally done this work on metal doors [citation omitttd]. As to formica doors involved in this case, the record is completely devoid of any evidence whatsoever that members of the Respondent union have ever prepared them to receive hardware either on or off the jobsite. In fact, the only evidence in the record on this point is to the contrary, and shows that the union has installed doors identical with those in dispute in the Mid-America Building (the old Labor Temple) in Decatur, Illinois [citation omitted]. Limited to the facts, the union cannot meet the requirements of the carefully articulated definition of traditional performance formulated by the Board and

adopted by the Supreme Court in *National Woodwork, supra.*

In *National Woodwork,* the Board in adopting tht Trial Examiner stated:

> The tasks of "cutting out and fitting" the material listed in the second sentence of rule 17 are obviously tasks which are normally performed by carpenters. The record shows that there have been occasions when millwork, including doors, came to a jobsite without having been previously cut out and fitted, that the tasks of cutting out and fitting such millwork, including doors, were considered by the contracting parties to be unit work to be performed by the jobsite carpenters, and that the carpenters on the jobsite did in fact perform those tasks on those occasions. The "will not handle" sentence was the language used in an attempt to protect and preserve this type of work for the jobsite carpenters. [149 NLRB at 656—57.]

Stewart Strolley's answer to this claim of Simmons was classis, "Doors are doors," and was also corroborated by the testimony of the most honest witness to appear at the hearing, Anderson's Sales Manager B. F. Potts, who testified that formica doors could be and were being prepared for hanging just as efficiently and well at the jobsite as at the Anderson factory. It is true that the use of formica doors at the Hospital project was in fact one of the very first occasions on which formica doors had been installed within the jurisdiction of Local 742. Some formica doors had been prepared for hanging by jobsite carpenters just outside the geographical jurisdiction of Local 742. It is also true that some few of the Anderson doors at the Hospital project required further preparation by the jobsite carpenters in order for them to be properly hung. In the light of the testimony that jobsite carpenters were competent to prepare formica doors, even as they were capable of pre-

paring wood doors, nullifies the Simmons' argument that it was not traditional work because of the formica composition of the doors in question.[11] In this case "Doors are doors," whether wood or formica. Accordingly I must, and hereby do, find that the work of preparing doors, wood or formica, for hanging and hardware, i.e., bevelling, routing, mortising, and cutting for length, is the historical and traditional unit work of carpenters at the jobsite.

The facts also prove that in their protests against and refusal to handle the premachined doors on the Hospital project, Foreman, Mamet, and Stolley all pointed out on each such occasion that the use of premachined doors eliminated or reduced the historical and customary unit work performed by the jobsite carpenters as well as taking money out of the carpenters' pockets. In addition Foreman and Mamet both offered to hang the 80 Anderson premachined doors already delivered at the jobsite if Simmons would tell Anderson to "quit our [unit] work."

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[11] It is interesting to note that in *American Boiler Manufacturers Association*, 154 NLRB 285 and 154 NLRB 314, the same firm of attorneys which represents Simmons here represented the Association there and made the exact opposite contention, to wit, that the union there had "waived" its claim to unit work of piping boilers at the jobsite by having installed prepiped boilers without objection on several occasions in the past. In its brief on review after remand of the above cases, the Board had this to say regarding this contention:

> To distinguish this case from *Woodwork*, therefore, petitioner's real argument necessarily must be that a work preservation object automatically loses its primary status, and becomes an improper basis for union action, once any substantial amount of unit work is allowed to be performed elsewhere. Presumably, petitioner would require the union not only to demand a contractual protection when the first packaged boilers appear but, in addition, to strike for such a clause at that point or else lose its rights forever. Apart from the fact that such a rule would hardly be conducive to labor peace and intelligent collective bargaining, petitioner's argument is based upon a faulty view of *Woodwork*.

Mamet and "Duff" Corbin, International carpenter representative, offered to hang the Anderson doors if Simmons would negotiate a rate for the hanging of such premachined doors and thus take care of the loss of that unit work. The whole protest by Respondents here was against the *premachining* of the doors with its resultant loss of traditional unit work for the jobsite carpenters. Respondents throughout sought recovery of the work lost either in fact and/or through additional compensation. The Trial Examiner is fully convinced and consequently must find that the object of Respondents' protest over the use of these premachined doors was to preserve to the jobsite carpenters their traditional work of bevelling, routing, mortising, and cutting the doors to length at the jobsite. It was not a product boycott.

In addition the facts prove beyond question that Respondents had no other objection to the use of doors manufactured by Anderson provided, of course, that they were not premachined so as to eliminate the aforementioned traditional jobsite work. Consequently Respondents had no purpose or object to cause Simmons to cease doing business with Anderson. The only possible "cease doing business" angle the Respondents might have had was that Anderson should cease doing "our [unit] work" which, at best, was purely coincidental and subsidiary to the work preservation objective found above. There is in this case no showing, in the words of the Supreme Court, that the Respondents' actions here "were tactically calculated to satisfy union objectives elsewhere." The Union's objective here related solely to the relationship of Simmons vis-a-vis its jobsite carpenter employees.

Up to this point on the question of "object" the instant case is on all fours with the leading case on premachined doors, *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967), where the majority opinion holds:

III.

The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances,[38] the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. There need not be an actual dispute with a boycotted employer, here the door manufacturer, for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of a primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. This will not always be a simple test to apply. But "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, Electrical Workers* v. *Labor Board*, 366 U.S. 667, 674.

That the "will not handle" provision was not an unfair labor practice in this case is clear. The finding of the Trial Examiner, adopted by the Board, was that the objective of the sentence was preservation of work

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[38] As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. See Comment, 62 Mich. L. Rev. 1176, 1185 *et seq.* (1964).

> traditionally performed by the jobsite carpenters. This finding is supported by substantial evidence, and therefore the Union's making of the "will not handle" agreement was not a violation of § 8(e).
>
> Similarly, the Union's maintenance of the provision was not a violation of § 8(b)(4)(B). The Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union. This and other substantial evidence supported the finding that the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters. [Citations omitted.]

Thus the *National Woodwork* case stands for the proposition that Respondents' work preservation object is legal and permissible within the meaning of Section 8(b)(4).

However, here, unlike the *National Woodwork* case, the plans and specifications, at least after Change Order No. 2 on August 15, called for the installation of life guaranteed, plastic, formica doors premachined at the factory. This gives rise to the argument that, when the plans and specifications require factory premachined doors, the project contractor has "no control" over the assignment of the work of preparing the doors for hanging and hence becomes the "neutral" demand as the assignment of that work lies elsewhere with either the owner, his architect, or the manufacturer of the doors.

Accordingly, in its brief Simmons argues:

> Thus, it is clear under all known precedent that even present a valid work preservation clause (concerning work that the bargaining unit has traditionally performed) an attempt to enforce such clause by a product boycott where the employed cannot control assignment

> of the work claimed is a violation of Section 8(b)(4)(B) of the Act. *National Woodwork, supra; accord, United Assn. Pipe Fitters Local 455 (American Boiler Manufacturers)* (3-M incident), 154 N.L.R.B. 285, 290 (1965), *enforced American Boiler Manufacturers Association* v. *N.L.R.B.*, 366 F.2d 815 (8th Cir. 1966).[12]

As noted subsequently in the Simmons' brief, the *National Woodwork* case specifically did not decide this "Right to control" issue because, as shown in footnote 3 of that decision, the respondent union there did not see fit to appeal any part of the lower court's decision where the plans and specifications were involved. This reluctance on the part of the union there makes this Trial Examiner's job that much more difficult here.

It is true that the *American Boiler* case, cited in the brief, did in fact specifically approve the Board's "right to control" doctrine. In fact that was the only part of the Board's Order approved in that decision, the remainder of the case which the Board had dismissed was remanded to the Board with the caveat:

> Certiorari has been granted in National Woodwork Mfgrs. Assn., supra, 384 U.S. 968, 88 Sup. Ct. 1863, 16 L. Ed. 680, and helpful guidelines from the Supreme Court upon the troublesome issues here presented may reasonably be anticipated.

Simmons also argued in its brief that the Board's *National Woodwork* decision, where the Board had found that the respondent union violated Section 8(b)(4)(B) of the Act by hanging doors for an employer (Driscoll) who paid the union a royalty therefor as well as by refusing to hang the doors for an employer (McDonnell) who refused to pay that royalty was authority for the proposition that a con-

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[12] The law firm representing Simmons here also represented American Boiler Manufacturers Assn. in the cited case.

tractor working with specifications requiring premachined doors need not bargain with the union as such actions would not be a defense to a secondary boycott charge. On this point the Board's decisions on remand in the *American Boiler* cases are of interest.

In its decisions on remand after the decision of the Supreme Court in the *National Woodwork* case, the Board reaffirmed its previous dismissals and, in addition, indicated a propensity to reverse the 3-M part of that decision, specifically cited by Simmons, if that had been possible under the terms of the remand. Regarding the 3-M part of the case, the Board held in pertinent part:

> 1. *The alleged violation of Section 8(e).* As the Board found in its original decision, the members of the fabrication committee on August 27 entered into a new *ad hoc* agreement to which Local Union No. 455, the Contractors Association and Hickey (by virtue of its membership in the Association) were parties, to the effect that the installation of the packaged boilers in this building was prohibited by the fabrication clause. We have found above that the fabrication clause was a lawful clause designed to preserve and reacquire trim-piping work traditionally performed by employees in the Contractors Association unit. To the extent that the *ad hoc* agreement had the same lawful object as the fabrication clause, it was, under the guidelines established by the Supreme Court, a primary work-preservation agreement outside the scope of Section 8(e). We note, however, that neither the Contractors Association nor any of its members, including Hickey, which contracted merely to install packaged boilers ordered by 3-M, was in a position to assign the trim-piping work at this project. Even if, in these circumstances, the Contractors Association and Hickey were regarded as secondary employers, and the August 27 *ad hoc* agreement as a "hot goods" agreement within the scope of

> Section 8(e), because these employers had no control over the assignment of the work, we would find, nevertheless, that as the trim-piping work in dispute was to be performed at the site of the construction, the August 27 agreement was protected by the construction industry proviso to Section 8(e), and was therefore lawful.

The Board then found Local 455 did not violate Section 8(b)(4)(A).

In the companion *American Boiler* case the Board's brief on review referring to the Tonka Toys incident says:

> As set forth in the counterstatment (pp. 6-7, supra), Lamb had ordered the packaged boiler for the Tonka Toys project and it was his employees who were scheduled to install the boiler.[11] After the boiler had been delivered, the Union approached Lamb and attempted to have the trim-piping removed and reattached prior to installation. There is nothing in the record which demonstrates that Lamb could not have granted this demand. Installation of the packaged boiler as delivered was, in effect, an assignment to the boiler manufacturer of work the Union claimed for Lamb's unit employees. Compare *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.C. 203. Inasmuch as the Union was attempting "to prevent the assignment of such work to employees outside the unit" [R.34], by demands upon the unit employer, the "dispute was primary" as the Board concluded. Thus Lamb was the proper target of union pressure. [Citations omitted.] It is well settled moreover that any incidental effect this primary activity might have had on any suppliers of Lamb does

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[11] Contrast Lamb's position with that of 3-M, in the St. Paul case, who had ordered the packaged boiler, but was not the employer of the unit employees seeking the trim-piping work. See pp. 6-8 of the Board's brief in the St. Paul case.

not render unlawful the Union's otherwise lawful conduct. [Citations omitted.]

Petitioner disputes the propriety of the Board's characterization of Lamb as the primary employer [Br. 27-28]. According to Petitioner the evidence shows that although it was Lamb who *ordered* the packaged boiler, it was some unidentified architect who *specified* that a packaged boiler should be used. Consequently the argument concludes, Lamb lacked control over the disputed work and would have been deemed a neutral employer. But this argument fades before the record. The fact is that such an architect's specifications are usually accompanied by language allowing an "equivalent or approved equal" alternative to the packaged boiler [R. 270], and that a field assembled boiler would have been a fair equivalent. . . .

In these circumstances, the Union can hardly be said to have pressured the wrong employer when it approached Lamb. It was Lamb who had ordered the packaged boiler, Lamb who employed the Jobsite employees who would suffer from the loss of work, and Lamb who could remedy the Union's complaint by purchasing a conventional boiler instead.

Another incident, Pierre Aircon, in that same Board Decision, 167 NLRB No. 79, is also of interest here for the Board there held:

3. *The alleged violation of Section 8(b)(4)(ii)(B).* The Board in its original decision found that the fabrication committee's requirement of reasonable compensation [13] by Pierre Aircon Company for its breach of

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[13] The fabrication committee required Pierce Aircon Company, on October 22, 1963, to pay $100 for violating the fabrication clause by "entering into a contract . . . with the Deluxe Check Company for the installation of a . . . boiler [which] arrived with the trim on."

> contract constituted a peaceful method of resolving this dispute, and, therefore, Local Union No. 455 did not threaten, coerce, or restrain employers by its conduct in connection with this project within the meaning of subsection (ii) of Section 8(b)(4). We have again considered this matter and are of the same view. Moreover, even if the fine were considered coercive, it was directed towards Pierre Aircon, which was the primary employer as far as the record shows and was for the purpose of preserving unit work. It therefore was not prohibited by Section 8(b)(4)(B).

More recently, however, despite its decision remand in the *American Boiler* cases, a dividend Board again definitely reverted to the "right to control" doctrine with approval in *Pipe Fitters Local No. 120 (Mechanical Contractors' Association of Cleveland, Inc.)*, 168 NLRB No. 138, where the Board found the union in violation of Section 8(b)(4)(ii)(B) as regarded "cross over" piping required in the plans and specifications but not in regard to "end-pocket" piping which was not so required.

In the light of the above legal history I do not consider myself necessarily bound by the *Mechanical Contractors'* decision even though it be the Board's latest on the point so far as my research shows.

There are a few features of the instant matter which are of assistance in drawing that line "more nice than obvious":

At the time the Simmons Hospital contract was signed on June 9, the plans and specifications for that project called for wood doors with the historical preparation thereof for hanging to be done by the carpenters at the jobsite. This situation existed at the time of the first prejob conference. The second prejob conference and the finalization of Change Order No. 2, substituting premachined doors for the wood, occurred the same day. But Local 742

received no notification of Change Order No. 2 at any time prior to the December 1 attempt by Local 742 to bargain the matter out with Simmons. Hence, until that date, Local 742 had no means of knowing that its historical unit work had been subcontracted out by anyone to Anderson. No work preservation contract clause is required when unit work is subcontracted out. *Fibreboard Paper Products* v. *N.L.R.B.*, 379 U.S. 203. Its objection to this subcontracting was made promptly upon the discovery of the premachined doors to the immediate employer of the employees whose work was thus being lost.

Actually the facts show that the premachining of the doors as well as the so-called lifetime guarantee required by the specifications were of no importance to either Hospital or its architect. Hospital, through its manager, Perry, acknowledged that all it wanted was plastic formica doors and that there had been no discussion of either premachining or the lifetime guarantee of said doors. The architect's sole interest, as its representation admitted, was that the doors looked nice when hung.

It thus looks as though the premachining and lifetime guarantee got into the specifications because some young architectural clerk, like young law clerks, discovered some nice surrounding language in other plans and specifications and decided to copy same into these plans and specifications and for no other reason.

There was nothing sacrosanct about these plans and specifications of this project. They had been changed before, as for example, Change Order No. 2. Also the specifications for the lead doors had been changed at the suggestion of the door manufacturer. Simmons could have suggested the change in specifications here without trouble.

As previously noted, neither Hospital nor its architect knew nor cared about the premachining or the lifetime guarantee. They would have had no objection to another

change of the plans and specifications in this regard. Such change would also have been satisfactory to Anderson from its bid on the wood doors and from Potts testimony which also proved that such a change would have had no effect upon the doors. Potts also indicated that "something" could have been worked out even in regard to the lifetime guarantee.

Neither Hospital, its architect, or Anderson was even given the opportunity to reject a change in the specifications relating to the doors. Simmons, the self-proclaimed "neutral" as well as the only party with a financial stake in the matter, rejected the suggestions of Local 742 for all parties without consultation by filing the unfair labor practice charges which started the instant case.

As previously noted Change Order No. 2 resulted in a $14,000 bonanza to Simmons, an extra $2,000 over cost from the Hospital and $12,000 right out of the pockets of the employee carpenters due to the elimination of unit work already included in the Simmons contract with Hospital because in the original bid the wood doors were not to have been premachined.

Rather than to ask for a very possible change in the specifications or to bargain a new rate for hanging premachined doors as suggested by Foreman and Mamet, the attorneys for Simmons chose to file the charges here, thus eliminating entirely these possible peaceful solutions of the problem through collective bargaining.

Implicit or explicit in the suggestions of Local 742 for a peaceful solution of the problem existing over the loss or dimunition of its unit work was the change in the plans and specifications permitting the return of the traditional unit work (preparing the doors for hanging) or its equivalent (a rate for hanging premachined doors.) Each of these solutions related directly to the labor relations of Simmons vis-a-vis its own carpenter employees.

Even if we accept the Board's *per se* "right to control" doctrine regarding the plans and specifications, still Simmons here had control over a sum of $14,000 with which to bargain a new rate for the hanging of what Simmons here maintains to have been a new product. Thus Simmons was not without control even under that doctrine.

It was thus Simmons' refusal of the collective-bargaining principle which obstructed and prevented the reaching of a peaceful solution to the problem, whereas it was Local 742 disappointed in Simmons' refusal to bargain which hung the premachined doors with some slight delay but without delaying the completion of the building in any way.

Thus in this case we find the use of prohibited "means" but for a legal, legitimate "object" with the Union's action in regard to both being direct primary action vis-a-vis the employer of the carpenters involved. Thus under the principles of the *National Woodwork* case, Local 742 has not violated Section 8(b)(4)(B) of the Act.

With the legal issues thus disposed of, the Trial Examiner wants to express the candid opinion that, if there had been more bargaining collectively and fewer unfair labor practice charges filed in the instant matter, everybody would have been better off financially—except, undoubtedly, the lawyers.

Accordingly, this Trial Examiner hereby recommends that the complaint in the instant matter against the Respondents here be dismissed in *toto*.

Dated at Washington, D.C. July 12, 1968.

Certified True Copy
O. W. Fields
Executive Secretary, NLRB
Date: July 12, 1968